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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 72-680

THOMAS T. SCHRADER,

Petitioner,

vs.

SELECTIVE SERVICE SYSTEM LOCAL BOARD No. 76 OF WISCONSIN, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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THOMAS T. SCHRADER,

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vs.

SELECTIVE SERVICE SYSTEM LOCAL BOARD No. 76 OF WISCONSIN, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

The petitioner, Thomas T. Schrader, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on May 25, 1972.

OPINIONS BELOW.

The opinion of the Court of Appeals (App. B, *infra* at A20-A29) has not yet been reported. The Court of Appeals decision reversed the decisions of the United States District Court for the Western District of Wisconsin (App. B, *infra* at A7-A19) which are reported in 328 F. Supp. 891 and 329 F. Supp. 966 (W. D. Wis. 1971).

JURISDICTION.

The judgment of the Court of Appeals was entered on July 28th, 1972. A timely petition for rehearing was denied on August 23rd, 1972 (App. B, *infra* at A30). The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1).

QUESTIONS PRESENTED.

1. Whether the Selective Service System's action in ignoring and acting in direct contravention to a District Court order and judgment constituted "basically lawless" conduct entitling Petitioner to pre-induction judicial review.

2. Whether Rule 23 of the Federal Rules of Civil Procedure permits District Courts to dispense with formal notice to absent class members in a class action.

STATUTES, REGULATIONS AND RULE OF COURT INVOLVED.

This case involves the interpretation or application of 28 U. S. C. Sec. 1361 and Sections 6(h)(2) and 10(b)(3) of the Military Selective Service Act of 1967, 85 Stat. 348, 50 U. S. C. Sec. 456(h)(2) and 460(b)(3) (Supp. IV, 1969), as well as Selective Service Regulation 32 C. F. R. Sec. 1622.30(a) (Jan. 1, 1970). Also involved are the provisions of Rule 23, Federal Rules of Civil Procedure. These are reprinted in pertinent part in (App. A, *infra* at A1-A6).

STATEMENT OF THE CASE.

The chronology of events leading to this request for review by this Court began on December 23, 1969. It was on this date that the underlying case of *Gregory* v. *Hershey*, 311 F. Supp. 1 (E. D. Mich. 1969) pronounced that the plaintiffs therein were entitled by law to fatherhood III-A deferments pursuant to the proper interpretations of Sec-

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tions 6(h)(1) and 6(h)(2) of the Military Selective Service Act of 1967, 50 App. U. S. C. Sec. 456(h)(1) and (h)(2), and Selective Service Regulation 1622.30(a), 32 C. F. R. Sec. 1622.30(a). The Court therein also held that it had jurisdiction despite Section 10(b)(3) of the Military Selective Service Act of 1967, 50 U. S. C. App. Sec. 460(b)(3) and that the plaintiffs could maintain the action as a class action in accordance with the provisions of Rule 23, Rules of Civil Procedure. The opinion in *Gregory* is reprinted in full in App. C, *infra* at A31-A38.

On February 27, 1970, the above same Court issued its judgment and order determining the validity of the class action and ordering the National Director to classify plaintiffs "and all others similarly situated to plaintiffs III-A upon a showing that they are members of the class as hereinbefore defined." *Gregory* v. *Hershey*, 51 F. R. D. 188 (E. D. Mich. 1970), reprinted in full in App. C, *infra* at A39-A41. A stay of this order was never obtained by the National Director, but an appeal to the United States Court of Appeals for the Sixth Circuit was taken.

Petitioner Schrader, a Selective Service registrant of Local Board No. 76 of Wisconsin, was classified I-A on June 1, 1970. On June 21, 1970, he appealed his reclassification and requested a personal appearance before the local board. On July 6, 1970, petitioner made his personal appearance and requested reclassification into class III-A Fatherhood based upon the pertinent facts in his Selective Service file[1] and upon the opinion, judgment and order in *Gregory* v. *Hershey*, *supra*. This was denied and he appealed the board's decision on November 18, 1970. His file,

1. The facts as to petitioner's fatherhood status and his membership in the *Gregory* class as defined by the District Court in *Gregory*, App. C *infra* at A39-A41), have never been in dispute and are conceded by respondents. These facts were accurately summarized by the District Court below and made a part of its findings. See App. B, *infra* at A7-A9.

with the printed case of *Gregory* therein, was duly forwarded to the State Appeal Board and his appeal subsequently denied November 18th, 1970. Petitioner's administrative remedies were thus exhausted. On November 23, 1970, the board ordered petitioner to report for induction. Petitioner then filed the present action in the United States District Court for the Western District of Wisconsin on November 25th, 1970. He sought injunctive and declaratory relief in the nature of mandamus predicated upon 28 U. S. C. Secs. 1361, 1331, 2201 and 2202 to compel his reclassification to III-A and to void his outstanding induction order.

On December 4, 1970, Judge Doyle, speaking for the District Court, granted a temporary restraining order on the basis that the petitioner was a member of the class determined in *Gregory* and set for argument the question of the *res judicata* effect of the *Gregory* judgment. On January 12, 1971, Judge Doyle continued the temporary restraining order previously in effect on the theory that the *Gregory* judgment had binding effect on petitioner's litigation. *Schrader* v. *Selective Service System Local Board No. 76, et al.*, 328 F. Supp. 891 (W. D. Wis. 1971) and 329 F. Supp. 996 (W. D. Wis. 1971). All of the *Schrader* opinions are reprinted in full in App. B, *infra* at A7-A29.

On January 26, 1971, eleven months after the District Court in *Gregory* filed its order and judgment, the United States Court of Appeals for the Sixth Circuit reversed the *Gregory* judgment, *Gregory* v. *Tarr*, 436 F. 2d 513 (6th Cir. 1971) reprinted in full in App. C, *infra* at A42-A49. This Court denied certiorari, Mr. Justice Douglas dissenting, 403 U. S. 922. The government in petitioner's litigation then moved the District Court below to dissolve the temporary restraining order. Instead of dissolving the restraining order, the District Court ordered the defendants to re-open petitioner's classification, holding that the

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National Director was bound to obey the *Gregory* District Court judgment and order while in effect, not stayed and not reversed. Obedience of the *Gregory* court order, the District Court ruled, would have placed the petitioner, as an undisputed member of the *Gregory* class, in Class III-A for the period in which the order was in full force and effect. In addition, Judge Doyle ruled that the National Director's action in ignoring the *Gregory* judgment and order constituted lawlessness, thereby entitling petitioner pre-induction judicial review (App. B, *infra* at A17).

The respondents noticed an appeal on August 2, 1971, and on July 28, 1972 the United States Court of Appeals for the Seventh Circuit reversed, Judge Eschbach dissenting. App. B, *infra* at A27. In reversing, the majority below held that "The Michigan District Court in *Gregory* erred in not requiring notice to be given in some manner to absent class members, and the Wisconsin District Court erred in applying the principle of *res judicata* to the *Gregory* ruling" (App. B, *infra* at A23), citing *Eisen* v. *Carlisle and Jacquelin*, 391 F. 2d 555, 564 (2 Cir., 1968). On September 13, 1972, the Court of Appeals recalled its mandate pending review on Certiorari (App. B, *infra* at A30).

REASONS FOR GRANTING THE WRIT.

I.

It is a fundamental precept in our common law that absent a stay a judgment order by a court with jurisdiction over the person or subject matter must be obeyed during its pendency. *Hovey* v. *McDonald*, 109 U. S. 150, 159-62 (1883); *Howat* v. *Kansas*, 258 U. S. 181, 189-90 (1922); *Lucy* v. *Adams*, 350 U. S. (1955); 9 J. Moore, Federal Practice Sec. 208.03 (2d ed. 1970). This must be true even if the order is reversed on appeal as erroneous or unconstitutional. *Walker* v. *City of Birmingham*, 388 U. S.

307, 320 (1967); *United States* v. *Shipp*, 203 U. S. 563, 573 (1906); *United States* v. *United Mine Workers*, 330 U. S. 258, 293-94 (1947); *Land* v. *Dollar*, 190 F. 2d 366, 379 (D. C. Cir. 1951), cert. dismissed, 344 U. S. 806 (1952). Without strict adherence to this elementary legal principle, the Rule of Law in this country and the orderly administration of justice pursuant to Article III, Section 2 of the Constitution of the United States will become "anachronisms".[2] The majority in the Court below simply does not come to grips with this crucial issue. Now this Court is called upon to reaffirm these maxims.

Land v. *Dollar*, *supra*, is applicable to the instant disobedience. In the *Land* case, the Secretary of Commerce

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2. In *Whitmore* v. *Tarr*, 331 F. Supp. 1369 (D. Neb., 1971), the court was faced with the precise issue here. The court stated:

> "A fundamental concept recognized consistently by the Supreme Court of the United States as immutable is that judicial orders shall not be disobeyed, "no matter how well founded their doubts might be as to its vaildity." (Citations omitted.) The Rule of Law dictates that the orderly processes of the judicial system must be preserved against acts, directed with impunity or otherwise, which lessen the efficacy of the courts. The judicial power contained in Article III, section 2, of the Constitution of the United States is at issue, and it is my obligation, as it is the obligation of every federal judge, to safeguard that instrument of ensuring against circumvention of the federal judicial authority.
>
> That the ignoring or violating of a judicial order is by a member of the executive branch of government does not alter the necessary rule. Unless the federal courts are able to judge the legality of actions taken by the executive branch, the separation of powers is a historical anachronism. See Wright, "Professor Bickel, The Scholarly Tradition and the Supreme Court" 84 Harv. L. Rev. 769 (1971). The only protection the judicial branch has against infringement upon its authority by the executive branch, other than the traditional contempt power, is to refuse the enforcement in the courts of official actions taken in contravention of judicial power. Consequently, when a member of the executive branch acts contrary to a court order, the acts of the executive are without effect to the extent that they violate the court order." *Id.* at 1372.

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was ordered to show cause why he should not be held in contempt for violating a Court decree. A unanimous court stated:

> "There can be little doubt of the teachings of (The United Miners) Case. An order issued by a court having jurisdiction of the persons and subject matter must be obeyed, even though the defendants may sincerely believe that the order is ineffective and will finally be vacated, even though the Act upon which the order is based is void, even though the order is actually set aside on appeal, even though the basic action becomes moot. ...
> ....
> Let us apply that decision to the allegations made in the matter now before us. The respondent parties are alleged to be making themselves judges of the validity of the decree issued by the court. They believe the decree erroneous. They are alleged to believe that they can eventually in some other proceeding have the decree set aside. But none of those considerations, however, sincerely entertained, can justify failure of the persons before us to comply with the decree, or minimize the duty of the court to compel compliance. The law which the courts applied to Lewis and the miners is equally applicable to agents of the government. (190 F. 2d at 379.)

The facts in petitioner's case are in point. With full knowledge of the *Gregory* District Court decree (App. C, *infra* at A39-A41), (petitioner had placed a photocopy of the *Gregory* opinion, judgment and order in his Selective Service file, and had personally delivered a copy of the same to counsel for the Wisconsin State Selective Service Director)[3] the Selective Service System in Wisconsin refused to reclassify petitioner III-A fatherhood. Respondents went much further, though, than just ignoring the *Gregory* decree. *Prior to* the time *Gregory* was reversed, the respond-

3. Selective Service counsel's answer to petitioner was that *Gregory* was on appeal.

ents issued petitioner's induction order.[4] The machinery of the Selective Service System was, therefore, not even content to await the outcome of the litigation. Their disobedience thus constituted direct positive action in clear contravention to a lawful court order. It is respectfully suggested that this blatant disregard for the rights of petitioner and others in his class should not be tolerated.

II.

The majority of the panel below is not alone in its failure to seriously question the blatant disobedience of the respondents to the specific and non-frivolous mandate of the *Gregory* District Court. Besides petitioner's case, a request for review by this Court has already been made in *Sandler* v. *National Director of Selective Service*, Civil 71-60-N, No. 7-2158 (4th Cir. May 25, 1972). The case of *Zeilstra* v. *Hershey*, Civil 6251 (W. D. Mich. Nov. 4, 1971), reversed, No. 72-1131 (6th Cir. Aug. 24, 1972) is probably now also en route. The same issue has also been litigated in *Whitmore* v. *Tarr*, 331 F. Supp. 1369 (D. Neb. 1971), appeal dismissed No. 71-1714 (8th Cir. Jan. 31, 1972) and *Germonprez* v. *Director of Selective Service*, 318 F. Supp. 829 (D. D. C. 1970), appeals pending, Nos. 71-1381 and 71-1382 (D. C. Cir.). The District Court opinions in *Whitmore* and *Zeilstra* vigorously support the position taken by the District Court below. *Zeilstra* is reprinted in App. D, *infra* at 61-74. Thus, more than the rights of just this petitioner are involved in this litigation.

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4. Petitioner's induction order issued November 23, 1970. The United States Court of Appeals for the Sixth Circuit reversed the District Court in *Gregory* on January 26, 1971.

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III.

A subsidiary[5] but critically important issue raised below centers around the majority panel's holding that failure to give any notice to absent class members rendered the class action "futile" (App. B, *infra* at A22-A23). Not only does this holding amount to an unlawful collateral attack on the jurisdictional findings of the *Gregory* District Court, it completely devastates Rules 23(b)(1) and 23(b)(2) as effective vehicles for avoiding duplicitous litigation. Presumably now any court of collateral jurisdiction can attack a class action judgment of a first court by searching for some due process loophole, despite the fact that due process safeguards are built into the rules. This is exactly what has happened in the aftermath of *Gregory*, wherein several District Courts failed to use the required judicial restraint as exemplified by Judge Doyle's decision below.[6] (App. B, *infra* at A17). Economic utilization of the federal court system as intended by the rules is thus foreclosed.

If the jurisdiction of the first court is litigated in the first proceeding, the litigants may not question it in the second. This principle of *res judicata* is true whether the basis is claimed lack of jurisdiction over the person, *Baldwin* v. *Iowa State Traveling Mens' Association*, 283 U. S.

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5. In his dissent, Judge Eschbach below points out:

"The majority in this action have now determined that because of the lack of notice to absent class members in *Gregory* v. *Hershey*, *supra*, there never existed a valid class to which plaintiff Schrader could belong. Even accepting the wisdom of requiring notice in all representative actions under Fed. R. Civ. P. 23(b)(1) and (2), I do not find that determination dispositive in this case." (App. B, *infra* at A27).

6. Part II, *infra*. The cases of *Germonprez*, *Sandler* and *Pasquier* v. *Tarr*, 318 F. Supp. 1350, 1353 (E. D. La., 1970), aff'd. 444 F. 2d 116 (5 Cir. 1971) are pertinent. After passing that the *Gregory* District Court erred in not requiring notice to absent class members, each court had to then delve into the merits and jurisdictional issues involved. The same is true regarding the majority decision below. (App. B, *infra* at A24-A25).

522 (1931); over land as a res, *Durfee* v. *Duke*, 375 U. S. 106 (1963); or lack of jurisdiction over the subject matter, *Davis* v. *Davis*, 305 U. S. 32 (1938). See also. Restatements of Judgments, Sec. 10. Collateral attacks are not favored in the law. There can be no question that the District Court in *Gregory* seriously considered the jurisdictional problem presented by Section 10(b)(3), the bar to pre-induction judicial review (*Infra*, App. C, at A36-A38). It also carefully considered the *res judicata* effect compelled by the class action aspect of the case (*Infra*, App. C, at A39-A41). There is manifest wisdom in the principle that courts of collateral jurisdiction defer to the court which first fully litigates an issue. Thus, Judge Doyle acted properly in the District Court below by refraining from a constitutional scrutiny of the *Gregory* District Court's findings as to its jurisdiction. The orderly administration of the federal judicial system compels this restraint. The majority's statement below that "the Wisconsin District Court erred applying the principle of *res judicata* to the *Gregory* ruling" amounts to such an improper collateral attack.[7]

Even if such a collateral attack by respondents on the class action nature of *Gregory* is permitted by this Court, it becomes clear that the class action was indeed valid. The language of Rules 23(b)(1), (b)(2), (b)(3) read in conjunction with 23(d)(2) makes notice in subdivisions (b)(1) and (b)(2) discretionary with the court. *Northern Natural Gas* v. *Grounds*, 292 F. Supp. 619, 636 (D. Kan. 1968), aff'd, 441 F. 2d 704 (10th Cir. 1971), *cert. denied*, 3 B Moore's Federal Practice, Sec. 23.55, pp. 23-1152-1153. Judge Smith in the *Gregory* District Court decision found that:

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7. As Judge Doyle states below:

> ". . . the very purpose of Rule 23 was to reduce multiple litigation of the same issues. I see no good reason why the government should be permitted continual relitigation of an issue already judicially determined." (App. B, *infra* at A14).

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> the class being represented is so numerous that joinder of all members is impracticable, there are questions of law and fact common to the class, the claims of defenses of the representative parties are typical of the claims or defenses of the class, and the representative parties will fairly and adequately represent the interest of the class . . . (App. C, *infra* at A39).

He also concluded that the action was properly maintainable under subdivisions (1) and (2) of Rule 23(b)[8] and ruled in his order that: "Notification of members of the class is impracticable because of the number of members and the absence of any reasonable way of identifying them. . ." (App. C, *infra* at A40).

The majority panel below relied on *Eisen* v. *Carlisle and Jacquelin*, 391 F. 2d 555, 564-65 (2d Cir. 1968) to support their broad holding that notice is required in all class actions. It is important to note that the *Eisen* case turns not on an interpretation of Rules 23(b)(1) and (b)(2), with which *Gregory* is concerned, but rather is concerned with Rule 23(b)(3). Rule 23(b)(1) says that class actions are maintainable if there is a risk of inconsistent adjudications creating incompatible standards for members within a class or for the party opposing the class as where adjudications with respect to individual members would be dispositive of

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8. Judge Smith expressly found that "[t]he prosecution of separate actions, by individual members of the class would create a risk of inconsistent or varying adjudications, which Rule 23(b)(1) of the Rule of Civil Procedure seeks to avoid, with respect to individual members of the class, would establish incompatible standards of conduct for the defendants, and such incompatible standards make declaratory relief with respect to the class as a whole appropriate . . ." *Gregory* v. *Hershey*, 51 F. R. D. 188, 189 (E. D. Mich. 1970). Moreover, he concluded that "(t)he defendants have acted or refused to act on grounds generally applicable to the class, thereby making applicable to the class, thereby making appropriate final relief in the nature of mandamus and corresponding declaratory relief with respect to the class as a whole, as contemplated by Rule 23(b)(2) of the Rules of Civil Procedure . . ." (App. C, *infra* at A39-A40).

interests of other members not parties. Rule 23(b)(2) actions are maintainable if the party opposing the class acts on grounds applicable to all members of the class making injunctive or declaratory relief appropriate. Rule 23(d)(2) is the pertinent notice provision for Rules 23(b)(1) and (b)(2) type actions. Its language as to notice is permissive (App. A, *infra* at A5). Rule 23(b)(3) allows class actions where questions of law and fact are common to a class. In all (b)(3) actions notice of some kind is mandatory. The *Eisen's* case dicta that notice is required in all class actions conflicts with its earlier admonition concerning the whole of Rule 23 as amended in 1966. The Court states:

> Indeed, we hold that the new rule should be given a liberal rather than a restrictive interpretation. (391 F. 2d at p. 564.)

A leading authority, Moore's Federal Practice has made these observations concerning the dicta in *Eisen*:

> Although the Rule does not command the giving of any notice to members of (b) (1) and (b) (2) types of class actions, while it mandates notice in a (b) (3) type of class suit, the Second Circuit in *Eisen* v. *Carlisle and Jacquelin* stated that notice is required as a matter of due process in all representative actions. Judge Brown, however, held *contra* in *Northern Natural Gas Co.* v. *Grounds* ((Dist. Kansas 1968), 292 F. Supp. 619, 636). We believe he is right and, with deference, the Eisen position is not sound. The Rule does not demand notice in the (b)(1) and (b)(2) actions; and, although the operation of the rule in a particular case might violate due process, (*Hansberry* v. *Lee*, 311 U. S. 32, 61 S. Ct. 114, 85 L. ed 22 (1940) there is a strong presumption that the Rule qua rule is valid, and practicalities support the same conclusion. The *Eisen* approach is too inflexible. Some (b)(1) and (b)(2) actions will have gained wide notoriety. Notice would add little or nothing. There will be situ-

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> ations where the class is cohesive, or the legal relationship of the members enable one or more to stand in judgment for all, and where the representatives are truly representative and faithful—a most important factor. (*Northern Natural Gas* v. *Grounds.*) In these and related situations, we suggest that, although some notice to the members may be desirable and may be given as provided in (d)(2), a judgment should be *res judicata* as to all the class, even in the absence of notice, in (b)(1) and (b)(2) situations when the requirements of Rule 23 have been satisfied. On the other hand, in the (b)(3) type of class suit, where notice is mandatory, there is no jural relationship between the members. They are merely fellow travelers related only by some common question of law or fact and with the right to opt out of the class. The mandatory notice under (c)(2) informs them of that right." (3 B Moore's Federal Practice, Sec. 23.55 at p. 23-1152-1153.)

The *Advisory Committee Note to Amended Rule 23* (As amended, 1966) clearly supports this view:

> Subdivision (d)(2) does not require notice at any stage, but rather calls attention to its availability and invokes the courts discretion. In the degree that there is cohesiveness or unity in the class and the representation is effective, the need for notice to the class will tend toward a minimum.

Thus, adequacy of representation is the important due process consideration in class actions. *Hansberry* v. *Lee*, 311 U. S. 32 (1940), *Mullane* v. *Central Hanover Bank and Trust Co.*, 399 U. S. 306 (1950). Subsequent courts have rejected the *Eisen* and *Pasquier* v. *Tarr*,[9] 318 F. Supp. 1350 (E. D. La., 1970), cases. *Mungin* v. *Florida East Coast Ry. Co.*, 318 F. Supp. 720, 732 (M. D. Fla. 1970), aff'd 441 F 2d 728 (5th Cir. 1971); *Northern Natural Gas* v. *Grounds*, 292 F. Supp. 619, 636 (D. Kan. 1968), aff'd, 441

9. Also relied upon by majority below.

F. 2d 704 (10th Cir. 1971), cert. denied, 40 U. S. L. W. 3320 (Nov. 6, 1971); *Johnson* v. *City of Baton Rouge*, 50 F. R. D. 295, 300-01 (E. D. La. 1970).

As to adequacy of representation in *Gregory*, the District Court there specifically found that "the representative will fairly and adequately represent the interests of the class" (App. C, *infra* at 51). In *City of New York* v. *International Pipe and Ceramics Corp.*, 410 F. 2d 295 (2d Cir. 1969), the Court sustained the trial court's action on the class action aspect of the case:

> The responsibility therefore of the fairest and most efficient way to handle the trial should be left in the hands of the judge charged therewith. . . .
>
> In resolving these countervailing situations, the judgment of the trial judge should be given the greatest respect and broadest discretion. . . . (410 F. 2d at 297, 298).

Finally, it is respectfully suggested that the presumption of the constitutionality of Rule 23 as formulated by the Supreme Court is not overcome by the weak assertion by the majority below that lack of notice rendered the class action in *Gregory* "futile". At no point in its opinion below is the judgment and order in *Gregory*, App. C, *infra* A39-A41, examined as to adequacy of representation and cohesiveness of interests (Assuming for argument that such a collateral examination is permissible). Certiorari should be granted if for no other reason than resolving the Judicial conflict surrounding Rule 23; which conflict could effectively hamper future administration of representative actions.

IV.

Pre-induction judicial review is available where the actions of the Selective Service System consist of non-discretionary lawless conduct in the classification of Selective

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Service registrants. *Oestereich* v. *Selective Service System Local Board No. 11*, 393 U. S. 233 (1968), *Breen* v. *Selective Service Local Board No. 16*, 396 U. S. 460 (1970). The issue here is whether Section 10 (b) (3) of the Military Selective Act of 1967,[10] precludes pre-induction review where Selective Service officials violate a specific, non-frivolous court mandate.[11] *Oestereich* held that pre-induction judicial review was available to a divinity student wrongfully deprived of a statutory exemption, and *Breen* held it to be available to a registrant deprived unlawfully of a statutory deferment. It is clearly established, then, that Section 10(b)(3) cannot be used to deny access to the courts prior to induction in all situations, and that *Oestereich* and *Breen* created the "basic" or "blatant" lawlessness standards to save the statute's constitutionality as applied to those situations. In last terms' *Fein* v. *Selective Service Local Bd. No. 7*, 405 U. S. 365 (1972), this Court denied pre-induction judicial review to a claimed conscientious objector holding:

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10. 50 U. S. C. App. Section 460(b)(3):

"No judicial review shall be made of the classification or processing of any registrant by local boards . . . except as a defense to a criminal prosecution . . . after the registrant has responded either affirmatively or negatively to an order to report for induction. . . ."

11. In the District Court below, Judge Doyle stated:

If the National Director disagreed with the position of the District Court in *Gregory*, his sole remedy lay in the Sixth Circuit Court of Appeals. Until the judgement of the District Court was reversed, the National Director was bound by it and bound by its direct order to reclassify to class III-A anyone who made a showing that he was a member of the *Gregory* class. To totally ignore this order while it was in effect constituted lawlessness. Under these circumstances I believe pre-induction judicial review is available to plaintiff. *Oestereich* v. *Selective Service*, 393 U. S. 233 (1969). In its brief the government reminds me that "the court is not to sit as a super-draft board." It is equally true, that the National Director of Selective Service is not to sit as the Court of Appeals for the Sixth Circuit (App. B, *infra* at A17-A19).

> Thus *Oestereich, Gabriel, Breen* and *Boyd* together establish the principles (a) that Section 10(b)(3) does not foreclose pre-induction judicial review . . . where administrative action, based on reasons unrelated to the merits of the claim to exemption to the merits of the claim to exemption or deferment, deprives the registrant of the classification to which, otherwise and concededly, he is entitled by statute, and (b) that Section 10(b)(3) does foreclose pre-induction judicial review . . . where the board, authoritatively, has used its discretion and judgment in determining facts and in arriving at a classification for the registrant (405 U. S. at 374-75).

Fein was basically a due process attack on the procedural classification process as applied to his request for conscientious objector status. In petitioner's case, though, there was a valid court order entitling him to III-A classification, and the local board simply ignored the court order thereby illegally accelerating his induction order, as in *Breen* and *Oestereich*. There is no room, under the *Fein* rule for the board to use its "discretion and judgment" and decide, then, to disobey a court order. In *Shea* v. *Mitchell*, 421 F. 2d 1162 (D. C. Cir. 1970) at 1165-66, the Court held that pre-induction judicial review was available and that "[w]hether that 'law' involves statute, *court decision* or regulation is as irrelevant as whether it involves an 'exemption' or a 'deferment' " (emphasis added). See *Walker* v. *City of Birmingham*, 388 U. S. 307 (1967), holding that court imposed orders must be obeyed as a pre-requisite to standing, while statutory mandates may be disregarded and subsequently attacked. Certainly, though, open disobedience to a federal court order fits the "basic" or "blatant" lawlessness test of *Oestereich* and *Breen*. And if it does not fit perfectly the test laid down in *Fein* it is doubtless true that *Fein* does not preclude pre-induction judicial review here, *Fein* being a procedural

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attack, and petitioner's case being a substantive attack on Selective Service System's positive disobedience to the *Gregory* order.

As Judge Eschbach concluded in his dissent below, more is involved here than petitioner's induction. The doctrine of separation of powers, the foundation of our government has been challenged.[12] Thus, disobedience of a statutory exemption (*Oestereich*) or a statutory deferment (*Breen*) amounts to an unconstitutional attack by the Executive upon the Legislature. Likewise, disobedience of a court ordered deferment (classification) is an unconstitutional attack by the Executive upon the Judiciary. When such an attack is made directly, as here, Section 10(b)(3) cannot be applied literally and must step aside. It is respectfully suggested that this—the unwarranted executive attack upon a valid judicial order—is the most important question before this court in this litigation, and perhaps the most important question to come before this Court in some time.

CONCLUSION.

For the foregoing reasons, the judgment of the Court of Appeals should be reversed and the judgment of the District Court reinstated.

Respectfully submitted,

STUART G. URBAN,
Lancaster, Wisconsin,
Attorney for Petitioner,
Thomas T. Schrader.

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12. The issue in question here concerns more than the induction of plaintiff Schrader. The deliberate and flagrant disregard of a federal court order by an executive arm of the Government challenges the very separation of powers upon which our system of government is based. (App. B, *infra* at A29).

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APPENDIX A.

STATUTES, REGULATIONS AND RULE OF COURT INVOLVED

The following statutes and regulations involved in this case are set forth verbatim in compliance with Rule 23(1)(d) of the Rules of this Court.

Statutory Provisions

28 U. S. C. § 1361 provides as follows:

> The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

Section 6(h)(2) of the Military Selective Service Act of 1967, 50 U. S. C. App. § 456(h)(2), provides in pertinent part as follows:

> (2) * * * Except as otherwise provided in this subsection, the President is also authorized, under such rules and regulations as he may prescribe, to provide for the deferment from training and service in the Armed Forces of any or all categories of persons who have children, or wives and children, with whom they maintain a bona fide family relationship in their homes. * * *

Section 10(b)(3) of the Military Selective Service Act of 1967, 50 U. S. C. App. § 460(b)(3), provides in pertinent part as follows:

> (3) * * * No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under sec-

tion 12 of this title [Section 462 of this Appendix], after the registrant has responded either affirmatively or negatively to an order to report for induction * * *.

SELECTIVE SERVICE REGULATION

Selective Service Regulation 1622.30, 32 C. F. R. 1622.30 (Jan. 1, 1970), provided in pertinent part as follows:

CLASS III

§ 1622.30 Class III-A: Registrant with a child or children; and registrant deferred by reason of extreme hardship to dependents.

(a) In Class III-A shall be placed any registrant who has a child or children with whom he maintains a bona fide family relationship in their home and who is not a physician, dentist or veterinarian, or who is not in an allied specialist category which may be announced by the Director of Selective Service after being advised by the Secretary of Defense that a special requisition under authority of section 1631.4 of these regulations will be issued by the delivery of registrants in such category, except that a registrant who is classified in Class II-S after the date of enactment of the Military Selective Service Act of 1967 shall not be eligible for classification in Class III-A under the provisions of this paragraph.

• • • • •

(c)(1) The term "child" as used in this section shall include a legitimate or an illegitimate child from the date of its conception, a child legally adopted, a step child, a foster child, and a person who is supported in good faith by the registrant in a relationship similar to that of parent and child but shall not include any person 13 years of age or over unless he is physically or mentally handicapped.

• • • • •

(3) No registrant shall be placed in Class III-A under paragraph (a) of this section because he has a

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child which is not yet born unless prior to the time the local board mails him an order to report for induction which is not subsequently cancelled there is filed with the local board the certificate of a licensed physician stating that the child has been conceived, the probable date of its delivery, and the evidence upon which his positive diagnosis of pregnancy is based.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 23. Class Actions.

(a) PREREQUISITES TO A CLASS ACTION. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) CLASS ACTIONS MAINTAINABLE. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class,

thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action To Be Maintained; Notice Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

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(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

(As amended Feb. 28, 1966, eff. July 1, 1966.)

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APPENDIX B.

OPINIONS AND JUDGMENTS BELOW

IN THE UNITED STATES DISTRICT COURT
For the Western District of Wisconsin

Civil Action No. 70-C-345

THOMAS T. SCHRADER

vs.

SELECTIVE SERVICE SYSTEM LOCAL BOARD NO. 76 OF WISCONSIN, ET AL.

(Filed: December 4, 1970)

DOYLE, *District Judge:*

This is a civil action for declaratory and injunctive relief. Plaintiff contends that his local draft board improperly denied him a III-A paternity deferment. He seeks a temporary restraining order prohibiting his induction into the Armed Forces. At the hearing on plaintiff's motion for a temporary restraining order, his selective service file was admitted into evidence for the purpose of deciding his motion.

For the purpose of deciding this motion and only for this purpose, and on the basis of plaintiff's selective service file, I make the following findings of fact. On September 12, 1964, plaintiff registered with Local Board No. 76 in Waukesha, Wisconsin. Plaintiff has never received an undergraduate II-S deferment under Section 6(h)(1) of the Military Selective Service Act of 1967, 50 U. S. C. App.

§ 456(h)(1). He is not now, nor has he ever been a physician, dentist or veterinarian, or in an allied specialist category as defined by Selective Service Regulation 1622.30(a), 32 CFR § 1622.30(a). On September 15, 1967, plaintiff received a graduate II-S deferment under Section 6(h)(2) of the Military Selective Service Act of 1967, 50 U. S. C. App. § 456(h)(2). He was reclassified 1-A on July 29, 1968. On November 15, 1968, plaintiff was classified III-A on the grounds of extreme hardship to dependents. On June 22, 1969, while he was still classified III-A, plaintiff became a father and this fact was reported to his local board on SSS Form 118. At all times since, he has maintained a bona fide family relationship in his home with this child. Plaintiff was reclassified I-A on June 1, 1970. On June 21, 1970, he appealed his reclassification and requested a personal appearance before the board. On July 6, 1970, he wrote to the board requesting that he be classified III-A and again informed the board that he was a father. That same day, he appeared before the Board and was reclassified I-A. On July 22, 1970, he sent a certificate of marriage and a certificate of birth (recording the birth of his child) to the local board. On August 8, 1970, the board again reviewed his status and retained him in class I-A.[1] His file was then forwarded to State Headquarters and on November 18, 1970, the State Appeal Board retained him in class I-A by a vote of five to nothing. On November 23, 1970, the board

1. On August 6, 1970, State Headquarters wrote the Local Board expressing its opinion on plaintiff's right to a paternity deferment:

> "On 15 November 1967 your registrant requested a graduate student deferment, and furnished evidence that he was a full-time graduate student. Therefore, the Local Board classified him in Class II-S on 19 December 1967.
>
> "It is our opinion that section 1622.30(a) of the regulations clearly indicates that a registrant deferred in Class II-S after the date of the enactment of the Military Selective Service Act of 1967 shall not be eligible for classification in Class III-A for reason of fatherhood."

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ordered the registrant to report for induction on December 8, 1970.

I find and conclude that unless a temporary restraining order is granted, plaintiff will suffer irreparable injury by being inducted into the Armed Forces before this case can be finally determined.

Plaintiff's contention is that under the Act and regulations he is entitled to a III-A paternity deferment and that in denying him this deferment the Selective Service System acted lawlessly. Under Executive Order No. 11527, issued April 23, 1970, the President eliminated future III-A deferments based on paternity. A threshold question in this case is the effect of that order on Mr. Schrader. The current SSS regulation 1622.30 (hereinafter the 1970 III-A regulation) was issued April 23, 1970, pursuant to Executive Order No. 11527. It provides in pertinent part:

> "(c) In Class III-A shall be placed any registrant who prior to the effective date of this paragraph in its present form submitted to his local board information establishing his eligibility for deferment on the grounds of fatherhood under regulations in effect prior to such date, or who is so classified prior to such date, and who continues to maintain a bona fide family relationship in their home with his child or children, except that this paragraph shall not apply to any registrant who subsequently becomes a physician, dentist, or veterinarian."

Plaintiff does not contend that he has been granted a paternity deferment under the terms of the 1970 III-A regulation (which does not provide for future paternity deferments), but that the above quoted language establishes his entitlement to such deferment provided he qualified under prior regulations. I agree. Local Board Memorandum No. 105, issued April 23, 1970, was addressed in part to the phasing out of paternity deferments. It provides in pertinent part:

"16. A registrant for whom a written request for a paternity deferment has been received or is postmarked prior to April 23, 1970, whether for a child born or conceived, shall be entitled to such deferment provided that he qualifies under the standard stated in the paragraph 15 above. So long as initial evidence is received or postmarked prior to April 23, 1970, clarifying information may be submitted after such date."

On May 20, 1970, the Director of Selective Service issued Operations Bulletin No. 338. Section III, paragraph 1 of that Bulletin clarified the meaning of "request" in Local Board Memorandum No. 105:

"Evidence submitted or postmarked prior to April 23, 1970, which should be considered as constituting a 'request' which local boards must consider should not be restricted to a physician's certificate of pregnancy. Any statement submitted at that time which indicates that pregnancy exists should be treated as a 'request,' and the local board should consider supportive evidence submitted later, such as a physician's certificate that conception occurred prior to April 23, 1970."

On June 22, 1969, plaintiff informed the Local Board that he had become a father. I find and conclude that this constituted a "request" for a III-A paternity deferment pursuant to Local Board Memorandum No. 105 and Operations Bulletin No. 338. Therefore plaintiff is entitled to a III-A paternity deferment provided that he qualifies for it under the regulation in effect just prior to April 23, 1970 (hereinafter the 1969 III-A regulation.[2]

In support of his contention that he is entitled to a paternity deferment under the 1969 III-A regulation, plaintiff relies on *Gregory* v. *Hershey*, 311 F. Supp. 1 (E. D. Mich. 1969). The *Gregory* opinion was followed by an

2. This also appears to be the view of Wisconsin State Headquarters. See footnote[1] *supra*.

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Order Determining the Validity of Class Action and Judgment. *Gregory* v. *Hershey*, Civil Action No. 33057 (E. D. Mich. Feb. 27, 1970), 2 SSLR 3604. The judgment in the *Gregory* case declared that the named plaintiffs and the other members of the defined class are entitled to III-A paternity deferments under the 1969 III-A regulation, and ordered that the defendants classify the named plaintiffs III-A, that they classify others similarly situated III-A upon a showing by such others that they are members of the defined class and that the defendants conform to the declaratory judgment. *Id.* The Order determined that the case should be maintained by the plaintiffs as a class action under Rule 23(a), (b)(1) and (b)(2) of the Federal Rules of Civil Procedure. It determined the class to consist of:

> "... all Selective Service registrants who have a child or children with whom they maintain a bona fide family relationship in their homes, who are not physicians, dentists or veterinarians or in an allied specialist category as defined by Selective Service Regulations 1622.30(a) (32 C. F. R. § 1622.30(a)), and who have not received an undergraduate II-S deferment under Section 6(h)(1) of the Military Selective Service Act of 1967 (50 U. S. C. App. § 456(h)(1), but who have received a graduate II-S deferment under Section 6(h)(2) of said Act." 2 SSLR 3604.

The Order further provided that "[n]otification of members of the class is impractical because of the number of members and the absence of any reasonable way of identifying them." *Id.* The *Gregory* judgment has not been stayed and is in effect.

Based upon my findings of fact set forth hereinabove I find and conclude that plaintiff Schrader is a member of the class determined in the *Gregory* case. *Germonprez* v. *Director of Selective Service*, Civil Action No. 1855-70 (D. D. C. July 8, 1970), 3 SSLR 3133.

In view of the *Gregory* judgment in favor of a class of which plaintiff is a member, plaintiff has established a substantial likelihood that he will prevail on the merits. However, beyond the citation of *Gregory* and *Germonprez, supra*, the question of the class nature of the *Gregory* suit and the res judicata effect of the *Gregory* judgment has not been sufficiently argued before this court.[3] For this reason, a further hearing will be set on these issues.

It is hereby ordered that the defendants, their agents, and all persons in active concert and participation with them, are restrained from initiating, proceeding with, permitting, cooperating with, or in any way ordering the induction of the plaintiff into the Armed Forces of the United States, pending the final hearing and determination of this action. It is hereby ordered that a hearing be held December 16, 1970, at 9:00 A. M., on the question whether this temporary restraining order should be vacated and set aside. If either party desires to submit a brief, it is to be served and filed by noon, December 15, 1970.

JAMES E. DOYLE
District Judge

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3. Just prior to the entry of this order, the United States Attorney filed with the Court a copy of a slip opinion in *Pasquier v. Tarr*, Civil Action No. 70-2056 (E. D. La. October 14, 1970). This case discusses the problem of the effect of the *Gregory* judgment. Because the court has not had sufficient time to study the slip opinion, the question of effect of *Pasquier* on this action is deferred until the further hearing ordered herein.

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OPINION AND ORDER

(Filed January 12, 1971)

Reported in 329 F. Supp. 966 (1971)

Plaintiff contends that his local draft board improperly denied him a III-A paternity deferment. He seeks declaratory and injunctive relief. On December 4, 1970, this court entered an opinion and temporary restraining order prohibiting plaintiff's induction into the Armed Services. Upon order of the court, briefs were submitted by the parties and a further hearing was had on the question of whether the temporary restraining order should remain in effect.

The sole question now before the court is whether the temporary restraining order entered herein should be vacated and set aside. This turns on the effect which should be given to *Gregory* v. *Hershey*, 311 F. Supp. I (E. D. Mich. 1969). In that case, the court determined that a class action was proper under Rules 23(a), (b)(1), and (b)(2) of the Federal Rules of Civil Procedure and rendered judgment for the class. In the opinion and order entered herein on December 4, 1970, I determined that plaintiff was a member of the *Gregory* class and, pursuant to the judgment in that case, was entitled to a III-A classification.

Defendants do not deny that plaintiff Schrader is a member of the *Gregory* class but contend that the *Gregory* judgment does not have binding effect in this litigation because notice was not given to the members of the *Gregory* class. They argue that even though notice is not required by the Rules in a Rule 23(b)(1) or 23(b)(2) class action, notice is necessary if the judgment is to have binding effect. They urge that this must be so on the basis of a mutuality principle: that is, the government maintains that if the *Gregory*

judgment had been adverse to the class of plaintiffs, the due process clause would not permit the government to enforce that judgment upon a member of the class who lacked notice, and that therefore it is unfair to bind the government when the plaintiff's class is successful.

A judgment in favor of the defendant against the class may not be binding upon members of the class who later sue the defendant and argue that they were no adequately represented in the class action. But the rationale for this view is that every man must be guaranteed his day in court. This rationale has no application to the converse situation in which defendants have had the opportunity fully to litigate the issues in a previous case.[1] The very purpose of Rule 23 was to reduce multiple litigation of the same issues. I see no good reason why the government should be permitted continual relitigation of an issue already judicially determined. I conclude that the order previously entered herein must remain in effect. *Whitmore* v. *Tarr*, Civ. 1693L (D. Neb. October 23, 1970); *Germonprez* v. *Director of Selective Service*, Civil Action No. 1855-70 (D. D. C. July 8, 1970); *contra*, *Pasquier* v. *Tarr*, Civil Action No. 70-2056 (E. D. La. October 14, 1970); *McCarthy*

1. I appreciate that Local Board No. 76 of Wisconsin and the Wisconsin State Director of Selective Service were not parties to *Gregory*. However, the National Director of Selective Service was a party to *Gregory* and is a party to the present action. With respect to an issue such as that which is presented in the two cases, that is, a matter of construing the statute and the presidential regulations, as contrasted with a matter of fact finding by a local board in a specific case, I believe that state directors and local boards throughout the country are bound by a judgment in a class action to which the National Director is a party. Also, if I am correct in considering *Gregory* binding upon the Selective Service System, then the actions of the local board and the state director in the present case were "lawless" and pre-induction judicial relief is available to plaintiff, despite Section 10(b)(3) of the Act. See *Oestereich* v. *Selective Service Board*, 393 U. S. 233 (1968); *Breen* v. *Selective Service Board*, 396 U. S. 460 (1970). *Gregory* was itself a pre-induction action.

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v. *Director of Selective Service*, Civil Action No. 70-C-592 (E. D. Wis., Dec. 31, 1970).

It is hereby ordered that the order entered herein on December 4, 1970, is to remain in full force until such time as it is modified or vacated by order of the court.

JAMES E. DOYLE
District Judge

OPINION AND ORDER
(Filed July 20, 1971)
Reported in 328 F. Supp. 891 (1971)

Defendants have moved for the dissolution of the temporary restraining order entered herein on December 4, 1970.

That order prohibited plaintiff's induction into the Armed Services, and was based entirely on a judgment entered in *Gregory* v. *Hershey*, Civil Action No. 33057 (E. D. Mich., Feb. 27, 1970), 2 SSLR 3604. For the opinion which underlay this judgment and order, see *Gregory* v. *Hershey*, 311 F. Supp. 1 (E. D. Mich. 1969). In *Gregory*, the court determined that a class action was proper and rendered judgment for the class. Plaintiff herein is a member of the *Gregory* class, and I determined that the judgment in that case was binding on the parties here, and that plaintiff was entitled to a III-A classification pursuant to that judgment. See opinion and order entered herein on January 26, 1971.

On January 26, 1971, the Court of Appeals for the Sixth Circuit reversed *Gregory* v. *Hershey*, sub nom. *Gregory* v. *Tarr*, 436 F. 2d 513 (6th Cir. 1971). On the basis of this reversal, the government has moved that the temporary restraining order entered herein be vacated.

I agree with the government that the *Gregory* judgment, now reversed, has no present binding effect on the parties to this action. But plaintiff now advances a new argument. He points out that during the period in which the Selective Service System considered and denied his request for a III-A deferment, the *Gregory* judgment was in effect and had not been stayed. For a detailed description of the chronology, see opinion and order entered herein on December 4, 1970. Under the *Gregory* judgment, the National

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Director of Selective Service was ordered to reclassify to class III-A all members of that class. 2 SSLR 3604. Plaintiff contends that when the National Director took no action to comply with this order of the District Court, he acted lawlessly. If the National Director had acted in compliance with the court order, plaintiff herein would have been classified III-A. Of course, after *Gregory* was reversed, the Selective Service System would be free to reclassify plaintiff in class I-A, but he would then have the right to request any other deferment to which he felt himself entitled, and to take an administrative appeal from the local board's denial of any new request for deferment. Plaintiff contends that the defendants should be restrained from inducting him into the Armed Services unless they first reopen his classification and afford him the right of administrative appeal which follows such reopening. 32 C. F. R. § 1625.13. He argues that only in this way can he be put back into the position he would have occupied had the National Director not acted in a lawless manner. I agree.

In arriving at my conclusions, I do not rely on the soundness of the position taken by the District Court in *Gregory*. In the couse of this litigation, I have not found it necessary to pass on the merits of plaintiff's position, but my research has disclosed no case which arrives at the same conclusions as those of the District Court for the Eastern District of Michigan. I also have grave doubts whether *Gregory* should properly have been maintained as a class action. But I do believe that these issues may only be reviewed, as they were, by the Sixth Circuit Court of Appeals, not by this court, and certainly not be the Director of Selective Service.

I reaffirm the view I expressed earlier in this case:

> "I appreciate that Local Board No. 76 of Wisconsin and the Wisconsin State Director of Selective Service

were not parties to *Gregory*. However, the National Director of Selective Service was a party to *Gregory* and is a party to the present action. With respect to an issue such as that which is presented in the two cases, that is, a matter construing the statute and the presidential regulations, as contrasted with a matter of fact finding by a local board in a specific case, I believe that state directors and local boards throughout the country are bound by a judgment in a class action to which the National Director is a party." See opinion and order entered herein on January 12, 1971, at p. 2 n. 1.

If the National Director disagreed with the position of the District Court in *Gregory*, his sole remedy lay in the Sixth Circuit Court of Appeals. Until the judgment of the District Court was reversed, the National Director was bound by it and bound by its direct order to reclassify to class III-A anyone who made a showing that he was a member of the *Gregory* class. To totally ignore this order while it was in effect constituted lawlessness. Under these circumstances I believe pre-induction judicial review is available to plaintiff. *Oestereich* v. *Selective Service*, 393 U. S. 233 (1969). In its brief the government reminds me that "the court is not to sit as a super-draft board." It is equally true, that the National Director of Selective Service is not to sit as the Court of Appeals for the Sixth Circuit.

I find and conclude that at the time plaintiff's request for a III-A deferment was denied by officials of the Selective Service System, he was a member of the *Gregory* class; that the facts he presented to the local board established that he was a member of that class; that his request was denied because the National Director of Selective Service had taken no steps to comply with the order of the District Court for the Eastern District of Michigan. I conclude that the inaction of the National Director was lawless, and that plaintiff is entitled to an order prohibiting his induc-

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tion into the armed services of the United States unless and until his classification is reopened.

IT IS HEREBY ORDERED that the temporary restraining order entered herein on December 4, 1971, is vacated.

IT IS HEREBY ORDERED that the defendants, their agents, and all persons in active concert and cooperation with them are restrained from initiating, proceeding with, permitting, cooperating with, or in any way ordering the induction of plantiff into the Armed Services of the United States, pending the final determination of this action, unless Local Board No. 76 first reopens plaintiff's classification and affords him the procedural rights which follow such reopening.

JAMES E. DOYLE
District Judge

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 71-1767

THOMAS T. SCHRADER
Plaintiff-Appellee

vs.

SELECTIVE SERVICE SYSTEM LOCAL BOARD No. 76 OF WISCONSIN, ET AL.,
Defendants-Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN NO. 70-C-345

JAMES E. DOYLE,
Judge

Argued June 7, 1972—Decided July 28, 1972

Before DUFFY, *Senior Circuit Judge*, DURFEE,* *Associate Judge* and ESCHBACH,* *District Judge.*

DUFFY, *Senior Circuit Judge.* This is a suit by Thomas T. Schrader, a Wisconsin Selective Service registrant who sought, in District Court, a pre-induction judicial review of the refusal of his Local Board to grant him a III-A fatherhood deferment.

* Associate Judge James R. Durfee of the United States Court of Claims is sitting by designation.

District Judge Jessee E. Eschbach of the Northern District of Indiana is sitting by designation.

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The Wisconsin District Court (Western District of Wisconsin) relying on a Michigan District Court's purported class-action judgment in *Gregory* v. *Hershey*, 311 F. Supp. 1 (E. D. Mich., 1969), issued a restraining order against the induction of the plaintiff in that case.

Following the reversal of the Michigan District Court's judgment by the Sixth Circuit Court of Appeals, the Government moved the Wisconsin District Court for a dissolution of the restraining order. However, the Wisconsin District Court, instead of dissolving the restraining order, entered an order enjoining the induction of the plaintiff unless the Local Board first reopened his classification. It is from this order that the United States Government takes this appeal.

The facts are not in dispute. During the period from 1963 to June 1967, when plaintiff was an undergraduate student, he was granted a II-S student deferment. In September 1967 during his first year in law school, Schrader requested and received a II-S graduate student deferment.[1] Upon the expiration of that deferment, he requested and received a III-A hardship deferment. This deferment was subsequently extended to June 1, 1970. In June 1969, the planitiff became a father and in October 1969, so informed his Board. When his III-A deferment expired in June 1970, plaintiff requested a renewal thereof, and also requested a III-A deferment based upon his fatherhood status. These requests were denied following plaintiff's personal appearance before the Board. He was subsequently classified I-A.[2]

Plaintiff appealed from the denial of the III-A father-

1. 50 U. S. C. App. 45 et seq.

2. The basis of the rejection of the fatherhood claim was 32 C.F.R. 1622.30(a) which, at that time, precluded the award of a fatherhood deferment to any registrant who had been classified in Class II-S after the enactment of the Military Selective Service Act of 1967.

hood deferment but the State Appeal Board affirmed that classification. On November 23, 1970, plaintiff was informed by the Local Board that an order for him to report for induction was being placed in the mails.

In the *Gregory* (District Court) case, the plaintiffs, as a class, had each been granted II-S graduate deferments under the Military Selective Service Act of 1967. They contended they were entitled to a III-A fatherhood deferment notwithstanding the language of 32 C. F. R. 1622.30 (a) which denied fatherhood deferments to persons who had been "classified in Class II-S under the 1967 Act."

Furthermore, in *Gregory*, the plaintiffs claimed their suit was a class action. The Michigan District Court agreed with plaintiffs' claims, ruling plaintiffs must be classified as III-A instead of I-A as ordered by their representative Boards, and that the action was properly maintained as a class action.[3] The Government promptly appealed, and the Sixth Circuit reversed. *Gregory* v. *Tarr*, 436 F. 2d 513 (6 Cir., 1971). The United States Supreme Court denied certiorari (403 U. S. 922).

The difference between the status of plaintiff Schrader in the instant case and the plaintiffs in *Gregory* is that here, Schrader sought a III-A fatherhood deferment after the District Court had decided *Gregory* but prior to the reversal of that decision by the Court of Appeals.

The Wisconsin District Court ruled that *Gregory*, which judgment was binding on the parties to that suit, was a class action, and that plaintiff herein was a member of the *Gregory* class. Therefore, the District Court reasoned, the National Director of Selective Service was required to

3. Court order determining the validity of the class action and judgment reported as *Gregory* v. *Hershey*, Civil Action No. 33057 (E. D. Mich. Feb. 27, 1970), 2 SSLR 3604.

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classify plaintiff in Class III-A although the plaintiffs in *Gregory* never had been thus reclassified.[4]

Evidently the Wisconsin District Court, in this action, was under the impression that the determination by the Michigan District Court in *Gregory* was *res judicata* with respect to the validity of the class action. The *Gregory* District Court ruled that ". . . [N]otification of members of the class is impractical because of the number of members and the absence of any reasonable way of identifying them. . . ." Thus, the *Gregory* court seemingly was under the impression that no notice to class members was required because of the permissive language of Rule 23(d)(2), F. R. C. P. However, we are of the opinion that the absolute failure to give any indicia of notice to absent members renders the purported class action in *Gregory* futile. The Michigan District Court in *Gregory* erred in not requiring notice to be given in some manner to absent class members, and the Wisconsin District Court erred applying the principle of *res judicata* to the *Gregory* ruling.

Certain authorities are of the opinion that notice is not required, as a matter of due process, when the class action is maintained under Rule 23(b)(1) or 23(b)(2), F. R. C. P. as was the *Gregory* action. However, the one Circuit Court of Appeals which has ruled on the requirement of notice when proceeding under the above-mentioned sections of

4. The District Court herein opined that during the interim when the *Gregory* District Court order was effective, the National Director was bound by the *Gregory* order to reclassify to III-A any registrant who made a showing that he was a member of the *Gregory* class. The District Court below reasoned that the failure of the National Director to abide by the *Gregory* order was the same type of administrative lawlessness on the part of the Selective Service System as evidenced in *Oestereich* v. *Selective Service*, 393 U. S. 233 (1969). Therefore, the District Court was of the opinion that in this case as in *Oestereich*, *supra*, pre-induction judicial review, usually barred by Sec. 10(b)(3) of the Military Selective Service Act of 1967, 50 U. S. C. App. Sec. 460(b)(3), was warranted.

Rule 23 held ". . . notice is required as a matter of due process in all representative actions, and 23(c)(2) merely requires a particularized form of notice in 23(b)(3) actions." *Eisen* v. *Carlisle & Jacquelin*, 391 F. 2d 555, 564 (2 Cir., 1968).

We are of the opinion that the *Eisen, supra,* decision is the correct interpretation of the notice requirement for Rule 23(b)(1) and (b)(2). The more recent District Court opinions agree that pre-judgment notice is required in all representative actions. *Pasquier* v. *Tarr*, 318 F. Supp. 1350, 1353 (E. D. La., 1970), aff'd. 444 F. 2d 116 (5 Cir., 1971); *Zachary* v. *Chase Manhattan Bank, N. A.*, 52 F. R. D. 532 (S. D. N. Y. 1971).

In our view, the District Court proceedings in *Gregory* was not a valid class action and was not binding upon anyone except the named plaintiffs to that action. See *Pasquier* v. *Tarr, supra.* The Wisconsin District Court improperly applied the *Gregory* case to the case at bar under the principle of *res judicata.* We feel plaintiff is without standing to assert, with respect to his claim for a III-A deferment, that the National Director acted in a lawless manner in failing to reclassify him and others similarly situated.

We now consider, absent the effect of the *Gregory* class action before the Michigan District Court, whether the plaintiff herein has overcome the bar of Sec. 10(b)(3) which, except for well-distinguished exceptions, precludes pre-induction judicial review.

The Supreme Court recently stated in *Fein* v. *Selective Service System Local Board No. 7, Yonkers, N. Y.*, ____ U. S. ____ (1972) with respect to the meaning and reach of Sec. 10(b)(3) and the recent Court decisions considering pre-induction judicial review, at page ____:

> "Thus *Oestereich, Gabriel, Breen* and *Boyd* together establish the principles (a) that Sec. 10(b)(3) does

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not foreclose pre-induction judicial review in that rather rare instance where administrative action, based on reasons unrelated to the merits of the claim to exemption or deferment, deprives the registrant of the classification to which, otherwise and concededly, he is entitled by statute, and (b) that Sec. 10(b)(3) does foreclose pre-induction judicial review in the more common situation where the board, authoritatively, has used its discretion and judgment in determining facts and in arriving at a classification for the registrant. In the latter case the registrant's judicial review is confined—and constitutionally so—to situations where he asserts his defense in a criminal prosecution or where, after induction, he seeks a writ of habeas corpus."

The action taken herein by the Local Board in refusing a III-A classification to plaintiff Schrader had a statutory basis in Selective Service Regulation 1622.30(a). Evident from this regulation is the fact that registrants who have received a II-S graduate deferment are foreclosed from a III-A classification. Therefore, it cannot be maintained on appeal by the plaintiff that his local board clearly departed from its statutory mandate. *Oestereich, supra; Breen* v. *Selectrive Service Local Board No. 16, Bridgeport, Conn.*, 396 U. S. 460 (1970). Rather, the reclassification of plaintiff Schrader to I-A was well within the statutory authority of the Selective Service System, and involved an exercise of their discretion which cannot be interfered with by court action before induction. *Clark* v. *Gabriel*, 393 U. S. 256 (1968); *Fein* v. *Selective Service Local Board No. 76, Yonkers, N. Y., supra; Edwards* v. *Selective Service Local Board No. 111*, 432 F. 2d 287 (5 Cir., 1970); *McCarthy* v. *Director of Selective Service System*, ... F. 2d ..... (No. 71-1144, 5/26/72, 7 Cir., 1972).

The Wisconsin District Court failed to establish any deprivation of a classification to which plaintiff Schrader would be statutorily entitled. We hold, therefore, the

plaintiff's instant suit for pre-induction judicial relief was and is barred by Sec. 10(b)(3).

As our Court recently stated in a per curiam opinion, *McCarthy* v. *Director of Selective Service System, supra,* with respect to Sec. 10(b)(3).

> "In conclusion, it deserves emphasis that the purity of the legal question submitted to a court is not the detriment of whether the bar of Section 10(b)(3) may be circumvented. *Fein* makes this much abundantly clear. Now Section 10(b)(3) is understood to mean what it says except in such highly unusual and strictly limited circumstances as were present in *Oestereich* and *Breen.*"

Such circumstances are not present in this case.

The order of the Wisconsin District Court dated July 20, 1971, is reversed and the District Court is instructed to vacate its prior orders enjoining the induction of the plaintiff herein. Plaintiff Schrader was improperly included in the *Gregory* class, and pre-induction judicial review was improperly granted in this action by the Wisconsin District Court.

Reversed and remanded for further action pursuant to this opinion.[5]

REVERSED AND REMANDED.

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5. The reversal of the District Court order is on jurisdictional grounds and is not intended to preclude or have a res judicata effect on whatever post-induction defenses plaintiff may have.

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ESCHBACH, *District Judge*, dissenting.

The defendants here, through the action of their National Director, violated a specific federal court order, directed at them, of which they were aware and which they unsuccessfully sought to stay at the district court level. I know of no government agency or any other litigant who is permitted to deliberately disregard with impunity a nonfrivolous federal court order. I therefore agree with the court below that the Selective Service System's utter disregard of the mandate issued in *Gregory* v. *Hershey*, 311 F. Supp. 1 (E. D. Mich. 1970) was "lawless," and I must respectfully dissent.

In *Gregory* v. *Hershey, supra*, Judge Smith determined there was a valid class action pursuant to both subparagraphs (1) and (2) of FED. R. CIV. P. 23(b). The Government did not appeal the class action determination by Judge Smith, but they did obtain a reversal on the district court's interpretation of Selective Service Regulation 1622.30(a). *See Gregory* v. *Tarr*, 436 F. 2d 513 (6th Cir. 1971), *cert. denied*, 403 U. S. 922 (1971). The plaintiff in this action, however, as a member of the defined class in *Gregory* v. *Hershey, supra*, was entitled to enforce the district court's unstayed order during the period before the Sixth Circuit Court of Appeals' decision.

The majority in this action have now determined that because of the lack of notice to absent class members in *Gregory* v. *Hershey, supra*, there never existed a valid class to which plaintiff Schrader could belong. Even accepting the wisdom of requiring notice in all representative actions under FED. R. CIV. P. 23(b)(1) and (2), I do not find that determination dispositive in this case. At the time plaintiff Schrader requested reclassification from the Wisconsin Local Board, he was unquestionably a member of that class defined in *Gregory, supra*. Further-

more, at that time there was a final, unstayed decision of a federal district court mandating the National Director of the Selective Service System to classify all members of that class III-A. Not only did the National Director flagrantly disregard this mandate, but the Local Boards also proceeded to induct into the armed services those members of that class, including plaintiff, who where to be reclassified under that court order.

Even assuming the factual situation most favorable to these defendants, viz., that the defendants justified their refusal to reclassify plaintiff on two federal district court decisions which held *Gregory, supra,* not binding on absent class members,[1] such reliance is not legal excuse for defendants' disregard of the federal court order. It is an immutable principle that if a competent court has issued an order "not transparently invalid or [having] only a frivolous pretense of validity, then the parties should obey the order and not substitute disobedience for appeal. . . ." *Walker* v. *City of Birmingham,* 388 U. S. 307, 315 (1967). *See also Carroll* v. *Commissioners of Princess Anne,* 393 U. S. 175, 179 (1968); *United States* v. *United Mine Workers,* 330 U. S. 258, 294 (1947); *United States* v. *Shipp,* 203 U. S. 563, 573 (1906). There has been no suggestion that Judge Smith's determination of a proper class action was frivolous. Furthermore, the court below and the court in *Whitmore* v. *Tarr,* 331 F. Supp. 1369 (D. Neb. 1970), correctly concluded that courts of collateral jurisdiction are bound by the pronouncements of the initial forum's determination regarding the class and are not free to attack the class nature of the suit once it has been judicially determined. Therefore, those cases

1. *Pasquier* v. *Tarr,* 318 F. Supp. 1350 (E. D. La. 1970), *aff'd,* 444 F. 2d 116 (5th Cir. 1971); *McCarthy* v. *Director of Selective Service,* 322 F. Supp. 1032 (E. D. Wis. 1970), *aff'd on other grounds,* No. 71-1144 (7th Cir., May 26, 1972).

finding *Gregory, supra*, inapplicable to absent class members should have accepted Judge Smith's factual determination and refrained from relitigating that issue. In fact, had the National Director properly carried out the unstayed mandate of *Gregory, supra*, those cases, including this one, which reopened the class action determination by Judge Smith, would have never existed—at least until *Gregory* was reversed on appeal. If the National Director disagreed with the decision of the district court in *Gregory*, his sole remedy lay with the Sixth Circuit Court of Appeals.[2]

The Sixth Circuit Court of Appeals in reversing *Gregory, supra*, noted that class actions enjoining the induction of others similarly situated throughout the nation can have "a far reaching and disruptive effect on the operation of the Selective Service System." *Gregory* v. *Tarr*, 436 F. 2d 513, 514 n. 2 (6th Cir. 1971). I would agree. However, the answer to the broad and sometimes gargantuan effects of this type class suit is not to ignore the order because it is found too pervasive. The remedy lies in limiting the power of a federal district court by amending the all-encompassing provisions of FED. R. CIV. P. 23.

The issue in question here concerns more than the induction of plaintiff Schrader. The deliberate and flagrant disregard of a federal court order by an executive arm of the Government challenges the very separation of powers upon which our system of government is based.

I would affirm.

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2. The National Director unsuccessfully sought a stay of the district court's mandate in *Gregory, supra*, at the district level but did not seek a stay from the Sixth Circuit pursuant to Fed. R. App. P. 8.

ORDER

(Filed August 23, 1972)

On consideration of the petition for rehearing and suggestion that it be heard *en banc* in the above-entitled cause, no judge in active service having requested a vote thereon, nor any judge voted to grant the suggestion, and all members of the panel having voted to deny a rehearing,

IT IS HEREBY ORDERED that the petition for a rehearing in the above-entitled cause be and the same is hereby denied.

ORDER

(Filed September 13, 1972)

On consideration of the motion and affidavit of counsel for Plaintiff-Appellee for a stay of the mandate in this appeal, it appearing to the Court that said mandate has previously issued on August 8, 1972,

IT IS ORDERED that the mandate of this Court be and the same is hereby recalled, and stayed for a period of thirty (30) days from this date, pursuant to the provisions of Rule 41(b) of the Federal Rules of Appellate Procedure.

APPENDIX C.

OPINIONS IN COMPANION CASE

This case is a companion sequel to *Gregory* v. *Hershey*, 311 F. Supp. 1 (E. D. Mich. 1969) and 51 F. R. D. 188 (E. D. Mich. 1970), reversed sub. nom. *Gregory* v. *Tarr*, 436 F. 2d 513 (6th Cir.), cert. denied 403 U. S. 922 (1971). Because repeated reference to the *Gregory* litigation is necessary to ascertain the grounds of the judgment below, the pertinent opinions and judgment in *Gregory* are set forth below in compliance with Rule 23(i) of the Rules of this Court.

STEPHEN L. GREGORY ET AL.,

Plaintiffs,

vs.

LEWIS B. HERSHEY ET AL.,

Defendants.

Civ. A. No. 33057

UNITED STATES DISTRICT COURT,
E. D. Michigan, S. D.
Dec. 23, 1969

OPINION OF THE DISTRICT COURT

TALBOT SMITH, *District Judge*

This case comes before us on a complaint for declaratory judgment, and other relief, arising under the Selective Service Act of 1967, Pub. L. 90-40, June 30, 1967 (81 Stat. 100, 50 U. S. C. App. §§ 451-471), hereinafter termed "the

Act." We are now ruling upon a Motion for Summary Judgment (Rule 56(a), Rules of Civil Procedure.)

The named plaintiffs bring the action in their own behalf of a class (Rule 23, Federal Rules of Civil Procedure), namely, Selective Service registrants who are fathers and who have received a deferment since June 30, 1967 as post-baccalaureate students pursuing a full-time course of instruction at a college, university, or similar institution of learning, under Section 6(h)(2) of the Act (this deferment being a "graduate II-S"). These plaintiffs have not, however, received pre-baccalaureate deferments ("undergraduate II-S's") since June 30, 1967. They have all been denied fatherhood III-A deferments by the Selective Service System.[1] They assert that they are entitled to such deferment under the Act and Regulation as a matter of right, and that the denial of such deferment is an illegal action by the Selective Service System founded upon an erroneous interpretation of the law. They have exhausted their administrative remedies, and have received orders to report for induction.

The plaintiffs before us in person are generally in like positions with respect to the draft and to their education. They are graduate students. They are well along in preparation for their chosen professional careers. They are married (and, with one exception, prior to the effective date of the Act), are fathers, and have incurred the substantial financial obligations that are today's usual concomitant of advanced educational and professional training. In addition, there are significant health problems with respect to the families of some, but not all, of the plaintiffs, although not of such magnitude, in defendants' judgment, as to warrant the grant to the involved plaintiffs of hardship III-A deferments under Regulation 1622.30(b).

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1. See, Act § 6(h)(2); Regulation 1022.30(a).

We turn at once to the Regulation in question, 1622.30(a). It provides in pertinent part as follows:

> 1622.30 "(a) In Class III-A shall be placed any registrant who has a child or children with whom he maintains a bona fide family relationship in their home and who is not a physician, dentist or veterinarian, or who is not in an allied specialist category which may be announced by the Director of Selective Service after being advised by the Secretary of Defense that a special requisition under authority of section 1631.4 of these regulations will be issued by the delivery of registrants in such category, except that a registrant who is classified in Class II-S after the date of enactment of the Military Selective Service Act of 1967 shall not be eligible for classification in Class III-A under the provisions of this paragraph."

Similarly, Section 6(h)(1) of the Act provides in part as follows:

> "No person who has received a student deferment under the provisions of this paragraph shall thereafter be granted a deferment under this subsection, nor shall any such person be granted a deferment under subsection (i) of this section if he has been awarded a baccalaureate degree, except for extreme hardship to dependents (under regulations governing hardship deferments), * * *"

Subsection 6(h)(2) of the Act provides in part as follows:

> "Except as otherwise provided in this subsection, the President is also authorized, under such rules and regulations as he may prescribe, to provide for the deferment from training and service in the Armed Forces of any or all categories of persons who have children, or wives and children, with whom they maintain a bona fide family relationship in their homes."

The question before us concerns the proper meaning and interpretation of the quoted portions of the Act and the Regulations. This, in turn, requires an examination of the

statutory scheme of the Act. In Carey v. Local Board, D. C. 297 F. Supp. 252, aff'd 2 Cir., 412 F. 2d 71, the Act was analyzed in the following terms:

"Section 6(h)(1) of the Act, 50 App. U. S. C. § 456 (h)(1), directs that the President shall provide for the granting of deferments to students who are satisfactorily pursuing a full time course of instruction in a college at the undergraduate level. This statutory undergraduate deferment continues until the student receives a baccalaureate degree or reaches age twenty-four, whichever occurs earliest. This subsection has no predecessor in the earlier selective service acts. It was enacted in 1967 and became effective on June 30, 1967. Pursuant to 32 C. F. R. § 1622.25, students in this category are classified as II-S (undergraduate II-S deferment).

"Another category of deferments is provided for in § 6(h)(2) of the Act. This section includes an authorization for the President to provide by regulation for the deferment of graduate students whose deferment he considers essential to the national interest. This section was also enacted with the 1967 amendments, but an almost identical provision was present in the 1948 and 1951 Acts. Section 6(h) of those earlier Acts authorized the President to provide for the deferment of both graduate and undergraduate students, there having been no equivalent in those Acts to the mandatory deferment of undergraduates now found in the current § 6(h)(1). Graduate students deferred under the President's rule-making power are also classified as II-S under 32 C. F. R. § 1622.26 (graduate II-S deferments).

"There is a third category of student deferment which applies to all university students, whether graduates or undergraduates. Under 32 C. F. R. § 1622.15 (b) this type of deferment is designated as I-S. Its source is § 6(i)(2) of the Act which has remained unchanged since 1951. * * *"

It is clear from the files and affidavits appended to the pleadings herein that plaintiffs have been denied fatherhood III-A deferments because of the defendants' belief that the Act prohibits the granting of such deferments to registrants who have received a graduate II-S deferment since June 30, 1967, relying upon Section 6(h) of the Act and Regulation 1622.30(a).

Such construction of both the Act and the Regulation is demonstrably erroneous. In the alternative, if only the Regulation is properly so construed, it is based upon an erroneous interpretation of the Act and unauthorized thereby. For the intent of the statute is clear. "No person," it reads in the quoted 6(h)(1) "who has received a student deferment under the provisions of this paragraph" (*this* paragraph being paragraph 1, the paragraph concerning the pre-baccalaureate, undergraduate II-S deferment) "shall thereafter be granted a deferment under this subsection" (subsection (h), authorizing fatherhood III-A deferments). But the crunch here is that these plaintiffs before us have never had a pre-baccalaureate, undergraduate II-S deferment under the Act. Hence they are not precluded from the fatherhood III-A by the express terms of the Act, and any construction or interpretation contrary thereto is obviously unlawful, as is any Regulation grounded upon such misconstruction. So far as the discretion of the Executive may be argued to support defendants' interpretation, such discretion is not boundless. Thus the Executive could not, in his discretion, provide for the deferment of Michigan fathers but not Indiana fathers. It must, to be lawfully exercised, not conflict with the express provisions of the Act.

A similar question has been presented in the so-called I-S cases. Those cases involved the availability of the I-S deferment under Section 6(i)(2) of the Act for those students who (as the plaintiffs in the case before us) had re-

ceived a graduate (but not an undergraduate) II-S deferment since the effective date of the Act, June 30, 1967. Regulation 1622.15(b) denies the right to a I-S deferment to a student who has previously received a II-S deferment, just as Regulation 1622.30(a) in the case before us denies a fatherhood III-A to registrants who have received a II-S. But upon a critical examination of the Act it has been clear to a number of courts, Ellis v. Hershey, 302 F. Supp. 347 (E. D. Mich. April 30, 1969); Bowen v. Hershey, 410 F. 2d 962 (1st Cir. 1969); Carey v. Local Bd. No. 2, D. C. 297 F. Supp. 252, aff'd 412 F. 2d 71 (C. A. 2, 1969); Foley v. Hershey, 409 F. 2d 827 (7th Cir. 1969); Marsano v. Laird, 412 F. 2d 65 (C. A. 2, 1969); that the Act forbade the granting of a I-S only to those students who had received an undergraduate II-S under Section 6(h)(1) of the Act, but not to those who had received a graduate II-S under the provisions of 6(h)(2) of the Act.

We are cited to portions of the legislative history tendered in explanation of the scheme of the statute, but we do not view the Act as involving the kind of ambiguity that warrants an examination of the legislative history for our guidance.

The defendants challenge our jurisdiction, arguing that Section 10(b)(3) of the Act bars pre-induction review. Defendants' obstacle, of course, is Oestereich v. Selective Service System Board No. 11, 393 U. S. 233, 89 S. Ct. 414, 21 L. Ed. 2d 402 (1968). But defendants seek to distinguish *Oestereich*. They rely primarily upon the concession by the Government found in that case. Thus, in this regard, the defendants argue

> "In his brief before the Supreme Court, the Solicitor General conceded that Oestereich was a full-time divinity student and recognized that he was therefore entitled to the unequivocal exemption afforded such registrants by Section 6(g) of the Act. The Supreme

Court agreed and held that Section 10(b)(3) would not bar pre-induction judicial review in that case. The Court accepted the Solicitor General's assurance that *Oestereich* was entitled to the divinity student exemption and agreed that there was no statutory authorization for his reclassification pursuant to regulations which were triggered by 'activities or conduct not material to the grant or withdrawal of the exemption' (*i.e.* Oestereich's status as a divinity student) 393 U. S. at 237, 89 S. Ct. 414. The Court therefore concluded that to compel one who was clearly *exempt* from military service to submit to such service (or to face criminal prosecution) in order to establish his 'plain and unequivocal' and *uncontested* right to such an exemption would be unduly harsh, 393 U. S. at 238, 89 S. Ct. 414, and held Section 10(b)(3) to be inapplicable." (Page 4, Defendants' Brief. All emphasis in original.)

We attach no significance to the concession by the Government in that case. Gracious it may have been, but the resolution of this kind of question does not turn upon Government's grace. Nor, as we read the case, did the Supreme Court rely upon any confession of error by the Government. Rather the thrust of its opinion was that the "conduct of [the] Local Board [was] basically lawless." 393 U. S. at 237, 89 S. Ct. at 416. Moreover, here, as in *Oestereich*, "there is no exercise of discretion by a Board in evaluating evidence and in determining whether a claimed exemption is deserved." *Id.* at 238, 89 S. Ct. at 416.

The defendants stress also that *Oestereich* involved a case of a statutorily granted exemption. But whether lawless action by a Local Board involves an exemption or a deferment, the action remains lawless. Neither dictionary definitions nor semantic subtleties control basic statutory rights. It is clear from the I-S cases heretofore cited that the denial of the statutory right to II-S deferment under Section 6(i)(2) of the Act likewise call for judicial review.

We are aware, we note in passing, of Anderson v. Hershey, 410 F. 2d 492 (C. A. 6, 1969), which limits the holding of the invalidity of the delinquency regulations in *Oestereich* to those situations in which the delinquency regulations apply to statutory exemptions.

In summary, as to jurisdiction, this matter concerns, not a deferment resting in the discretion of a Local Board or Selective Service official, but a deferment mandated by regulation; there is no factual question (or mixed question of fact and law) presented to the Court for decision, but a question of law only. Such legal question is, as well, applicable to an entire class of registrants, not simply to one particular individual. A civil action, moreover, in this Court, is the only feasible opportunity which this class of registrants has to present before a competent forum their legal arguments to obtain a determination, for the entire class, of the validity of their sought induction under these circumstances.

Upon a consideration of these factors it is our conclusion under the teachings of *Oestereich* that we have jurisdiction, that the cause of action shall be maintained as a class action, Rule 23, Rules of Civil Procedure, and that Regulation 1622.30(a), interpreted by defendants as hereinabove described, is illegal because founded on an erroneous interpretation of the Act and unauthorized thereby.

Suitable orders may be presented.

STEPHEN L. GREGORY ET AL.,
Plaintiffs,
vs.
LEWIS B. HERSHEY ET AL.,
Defendants.

Civ. A. No. 33057

UNITED STATES DISTRICT COURT,
E. D. Michigan, S. D.
Feb. 27, 1970

TALBOT SMITH, *District Judge*

ORDER DETERMINING THE VALIDITY OF CLASS ACTION

Upon motion of plaintiffs' attorneys and it appearing to the Court that:

1. The above cause of action was brought as a class action pursuant to Rule 23 of the Rules of Civil Procedure;

2. The prerequisites to a class action as set forth in Rule 23(a) of the Rules of Civil Procedure have been satisfied, in that the class being represented is so numerous that joinder of all members is impracticable, there are questions of law and fact common to the class, the claims or defenses of the representative parties are typical of the claims or defenses of the class, and the representative parties will fairly and adequately represent the interest of the class;

3. The prosecution of separate actions, by individual members of the class would create a risk of inconsistent or varying adjudications, which Rule 23(b)(1) of the Rules of

Civil Procedure seeks to avoid, with respect to individual members of the class, would establish incompatible standards of conduct for the defendants, and such incompatible standards make declaratory relief with respect to the class as a whole appropriate;

4. The defendants have acted or refused to act on grounds generally applicable to the class, thereby making appropriate final relief in the nature of mandamus and corresponding declaratory relief with respect to the class as a whole, as contemplated by Rule 23(b)(2) of the Rules of Civil Procedure; and that

5. Notification of members of the class is impractical because of the number of members and the absence of any reasonable way of identifying them; therefore

It Is Hereby Ordered, that the above cause of action shall be allowed to be maintained as a class action. The class is hereby determined to consist of all Selective Service registrants who have a child or children with whom they maintain a bona fide family relationship in their homes, who are not physicians, dentists or veterinarians or in an allied specialist category as defined by Selective Service Regulations 1622.30(a) (32 C. F. R. § 1622.30(a)), and who have not received an undergraduate II-S deferment under Section 6(h)(1) of the Military Selective Service Act of 1967 (50 U. S. C. App. § 456(h)(1)), but who have received a graduate II-S deferment under Section 6(h)(2) of said Act.

JUDGMENT AND ORDER IN THE NATURE OF MANDAMUS.

Upon motion of plaintiffs' attorneys for summary judgment pursuant to Rule 55 of the Rules of Civil Procedure and it appearing to the court that:

1) This action is validly brought as a class action, the class being defined as all Selective Service registrants who:

(a) have a child or children with whom they maintain a bona fide family relationship in their homes, and

(b) are not physicians, dentists, or veterinarians or in an allied specialist category, and

(c) have not received an undergraduate II-S deferment under the Military Selective Service Act of 1967 (50 U. S. C. App. §§ 451-73) [hereinafter referred to as "The Act"], but

(d) have received a graduate II-S deferment under said Act, as more fully appears in the ORDER DETERMINING THE VALIDITY OF CLASS ACTION, dated February 27, 1970;

2) Plaintiffs are all members of the above-defined class;

3) There are no material issues of fact; and

4) The Court has jurisdiction and plaintiffs are entitled to a judgment as a matter of law as more fully appears in the OPINION [2 SSLR 3524] filed herein and made a part hereof as if set out in full which contains further findings of fact and conclusions of law;

It Is Therefore Adjudged And Declared that plaintiffs and all others similarly situated are entitled to fatherhood III-A deferments as a matter of law pursuant to Section 6(h)(2) of the Act and Selective Service Regulation 1622.30(a) (32 C. F. R. § 1622.30(a)), and therefore

It Is Hereby Ordered that:

a) Defendants classify plaintiffs Clements, Gregory, Hovis, Sharpless and Silverman III-A as of the date of this order;

b) Defendants classify all others similarly situated to plaintiffs III-A upon showing that they are members of the class as hereinbefore defined; and

c) Defendant Lewis B. Hershey and defendant State Directors Custer, Hammack, Holmes and Knight in exercising their functions under Section 10 of the Act conform to the declaratory judgment made herein.

IN THE UNITED STATES COURT OF APPEALS
For the Sixth Circuit

Appeal from the United States District Court for the Eastern District of Michigan, Southern Division.

STEPHEN L. GRUDOSKY, ET AL.,
Plaintiffs-Appellees,

vs.

CURTIS W. TARR, National Director of Selective Service, et al.,
Defendants-Appellants.

Decided and Filed January 26, 1971

OPINION

Before: WEICK, McCREE, and BROOKS, *Circuit Judges.*

Weick, Circuit Judge. Plaintiffs filed a class action in the District Court challenging the application and validity of a Selective Service Regulation defining eligibility of draft registrants for what is known as a "fatherhood deferment" under deferment classification III-A.[1] The plain-

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1. Title 32, Code of Federal Regulations, section 1622.30 (January 1, 1970) provides, in pertinent part:

"(a) In Class III-A shall be placed any registrant who has a child or children with whom he maintains a bona fide family relationship in their [sic] home and who is not a physician, dentist or veterinarian, or who is not in an allied specialist category which may be announced by the Director of Selective Service after being advised by the Secretary of Defense that a special requisition under authority of section 1631.4 of these regulations will be issued by the delivery of registrants in

tiffs are draft registrants who have been re-classified I-A (available for military service) and ordered to report for induction. The defendants are the National Director of Selective Service, the State Directors of Selective Service of the states of Michigan, Indiana, Illinois and Minnesota, and a number of local boards and their members in said states. The class sought to be protected is limited to Selective Service registrants who have one or more children with whom they maintain a bona fide family relationship in their homes, who are not physicians, dentists or veterinarians or in an allied specialist category, and who have a post-baccalaureate student deferment (graduate II-S), but have not received a pre-baccalaureate student deferment (undergraduate II-S), under authority of the Military Selective Service Act of 1967, 81 Stat. 100, 50 U. S. C. A. App. § 451 *et seq.* Plaintiffs seek a declaratory judgment that the challenged regulation is invalid, at least as it is presently applied, and a mandatory injunction ordering classification in Class III-A (fatherhood deferment) for themselves and the class they seek to protect. Plaintiffs also seek to have declared void the orders to report for induction which each of them has received. Jurisdiction is allegedly founded on 28 U. S. C. A. §§ 1331, 1343, 1361, & 2201-02.

The action was submitted to the court upon the plaintiffs' motion for summary judgment and the defendants' motion to dismiss for lack of subject-matter jurisdiction

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such category, except that a registrant who is classified in Class II-S after the date of enactment of the Military Selective Service Act of 1967 shall not be eligible for classification in Class III-A under the provisions of this paragraph."

The fatherhood deferment provided by 32 C.F.R. § 1622.30(a) has been suspended by Executive Order 11,527 subsequent to the filing of the present case, but the order provides that those entitled to the deferment who requested it prior to the date of Executive Order shall still be entitled to it thereafter. Exec. Order No. 11,527, 35 F. R. 6571, 6572 (April 23, 1970).

and, in the alternative, for failure to state a claim upon which relief could be granted. The court had previously determined, upon plaintiffs' motion, the validity of the class action. The district court filed an opinion granting the plaintiffs' motion for summary judgment in which it determined that it had subject-matter jurisdiction over the action and that plaintiffs had presented an issue on which they were entitled to relief.[2] Defendants appeal from that judgment, contending that the federal courts are deprived of jurisdiction of this case by virtue of section 10(b)(3) of the Military Selective Service Act of 1967 [hereinafter "the Act"], 50 U. S. C. A. App. § 460(b)(3) and that the plaintiffs were properly denied fatherhood deferments under the authority of section 6(h)(2) of the Act, 50 U. S. C. A. App. § 456(h)(2), and the pertinent regulation, 32 C. F. R. § 1622.30(a) (1970). We reverse.

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2. Defendants have not questioned the validity of the class action although no notice to the members of the class was given as provided by Rule 23, Fed. R. Civ. P., nor have they questioned the jurisdiction of the court over the State Directors of Selective Service, the Local Boards and their members for the states of Indiana, Illinois and Minnesota.

Allowing class actions to be brought by Selective Service registrants to enjoin not only their own induction, but the induction of others similarly situated throughout the nation, can have a far-reaching and disruptive effect on the operation of the Selective Service System.

In *Whitmore* v. *Tarr* (D. Neb. Civ. 1963L, decided October 22, 1970), the court held that it was bound by the decision of the District Court in the present case on the ground of res adjudicata and enjoined the induction of a Nebraska registrant. In *Germonpre* v. *Director of Selective Service* (D. D. C. Civ. 1858-70, decided July 8, 1970), the court issued a preliminary injunction restraining the induction of a Kansas registrant on the basis of the present case. Query: Suppose that the District Court in the present case had ruled that the plaintiffs and others similarly situated were not entitled to III-A classification. Would such a decision be binding on a registrant from another state who had no notice of the action nor opportunity to defend against it?

In *Pasquier* v. *Tarr* (W. D. La. Civ. 70-2064, decided October 10, 1970), the court declined to follow the decision of the district court in the present case.

In considering the 1967 Act, Congress was concerned about the decisions of some federal courts permitting earlier review of Selective Service decisions than had previously been thought permissible. Thus, Congress statutorily imposed the rule of judicial review which presently defines jurisdiction:

> "No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President except as a defense to a criminal prosecution [for refusing to report] after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: *Provided*, That such review shall go to the question of jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant." 50 U. S. C. A. App. § 460(b)(3) (1968).

As interpreted, the constitutionality of this provision has been upheld. *Clark* v. *Gabriel*, 393 U. S. 256 (1968). It has long been recognized that Congress has a legitimate interest in protecting from litigious delays and interruptions a governmental activity so inextricably intertwined with national security as the procurement and training of military personnel. *See, e.g. Falbo* v. *United States*, 320 U. S. 549 (1944). In interpreting section 10(b)(3) of the Act, however, the Supreme Court has held that a literal interpretation of the provision was not justified, in *Oestereich* v. *Selective Serv. Bd.*, 393 U. S. 233 (1968). A literal reading would, in the first instance, suspend the constitutionality protected writ of habeas corpus. 393 U. S. at 238. The Court also concluded that Congress did not intend to preclude pre-induction judicial review in the special circumstances presented by *Oestereich* and *Breen* v. *Selective Serv. Bd.*, 368 U. S. 460 (1970).

In *Oestereich*, a divinity student who was unquestionably exempted by statute from eligibility for induction, was nonetheless reclassified I-A on the authority of the now-defunct delinquency regulations for having turned in his draft card in protest of the Vietnam War. *Oestereich* sought a permanent injunction prohibiting his induction. His complaint was dismissed by the district court for lack of jurisdiction under authority of section 10(b)(3), and the United States Court of Appeals for the Tenth Circuit affirmed. The Supreme Court reversed, holding that pre-induction review was not precluded where the action of the local board was "blatently lawless" and beyond its statutory authority. *Breen* reaffirms the principle of *Oestereich* where a registrant had a statutory deferment rather than a statutory exemption and the delinquency regulations were used to punish him for a draft card turn-in.

Contemporaneous with *Oestereich*, the Court announced its decision in *Clark* v. *Gabriel, supra*, holding that pre-induction judicial review was not available, except as a defense to a criminal prosecution, where the local board exercised, as contemplated by the statutory scheme, its judgment and discretion in granting or withholding certain categories of deferments. Plaintiffs seek to bring their allegations within the *Oestereich-Breen* exception to section 10(b)(3). In order to determine which line of decisions will control the present controversy, it is necessary to pierce the pleadings and determine precisely what category is raised by the merits of this controversy. *Stella* v. *Selective Service Board*, 427 F. 2d 887, 889 (2nd Cir. 1970).

The district court was of the opinion that it had jurisdiction since the question of whether the plaintiffs and the class they represent should be granted fatherhood deferments was not one committed to the discretion of the local boards and since no mixed question of law and fact or pure question of fact was presented to the Court for

determination. The court then held that the regulation should be interpreted to refer only to undergraduate student deferments or, in the alternative, that the regulation was inconsistent with the Act. Having made this determination, the court upheld its jurisdiction since the action of the local boards was "basically lawless" under the proper view of the regulation and the Act. The plaintiffs support the district court's determinations by urging essentially two alternative grounds. They contend that, properly interpreted, the regulation denies fatherhood deferments only to those who have received *undergraduate* II-S deferment since the effective date of the Act. They offer two reasons for the suggested interpretation—that the ambiguity of the regulation should be construed to fit the explicit statutory denial of fatherhood deferments to those having obtained undergraduate deferments or that the regulation was promulgated by the President under a mistaken view that the law required deferments to be denied all registrants having obtained a student deferment, whether graduate or undergraduate. We can see no reason to accept the plaintiff's invitation to interpret the regulation. It is plainly worded and appears in Title 32 immediately following the regulations regarding separate undergraduate and graduate student deferments, which were promulgated at the same time as the regulation in question. It is difficult to imagine, under these circumstances, how the Executive could have been unaware of the difference between undergraduate and graduate II-S deferment.

However, the plaintiffs also contend that the regulation is invalid if given its literal meaning as inconsistent with the statutory scheme. This strikes closer to our view of *Oestereich*, that only statutorily unauthorized actions of the Selective Service are open to pre-induction judicial review except as a defense to a criminal prosecution. However, this case falls short of the mark. Under the new statu-

tory scheme enacted in 1967, two new student deferment categories were created. Section 6(h)(1) of the Act provides that "the President *shall* . . . [defer] persons satisfactorily pursuing a full-time course of instruction at a college, university, or similar institution of learning. . . . A deferment granted to any person under authority of the preceding sentence *shall continue* until such person completes the requirements for his baccalaureate degree . . ." (emphasis added). However, the Act does not similarly create graduate or fatherhood deferments by its own force alone. Rather, in section 6(h)(2) of the Act, the President is *authorized* to provide for deferment of graduate students "under such rules and regulations as he may prescribe. . . ." The same paragraph further provides that:

> ". . . [T]he President is also authorized, under such rules and regulations as he may prescribe, to provide for the deferment . . . *of any or all categories* of persons who have children, or wives and children, with whom they maintain a bona fide family relationship in their homes." (Emphasis added.)

Thus, both the graduate student deferment and the fatherhood deferment are matters of Executive grace which can be made subject to any reasonable conditions, rather than matters of statutory right. The Executive has exercised its discretion to provide for both graduate deferments and fatherhood deferments, but has pre-conditioned the latter deferment on not having requested and received a graduate student deferment so as to preclude the "pyramiding" of deferments into complete exemption from military service. Clearly, the exercise of this discretion expressly bestowed upon it by Congress does not involve the Executive or the Selective Service System in conduct unauthorized by statute, as was envisioned by the Court in the *Oestereich* decision. To the contrary, *Oestereich* presented a situation where the Selective Service System attempted to exercise

punitive powers which Congress had not given it, having already prescribed a set of criminal penalties for violation of the Act. Here, the Act expressly bestows upon the Executive the discretion the exercise of which is challenged.

The judgment of the district court is reversed, and the cause is remanded with instructions to dismiss the complaint.

REVERSED.

APPENDIX D.

UNPUBLISHED OPINIONS IN RELATED CASES

The opinion in *Whitmore* v. *Tarr*, 311 F. Supp. 1969 (D. Neb. 1971) adjudicates the identical issue presented in this case. It may be located conveniently in the published sources. The case of *Sandler* v. *Tarr*, Civil No. 71-60-N (D. Md. 1971), affirmed No. 71-2158 (4th Cir., 1972) has already arrived in this Court on a Petition for a Writ of Certiorari. That case also presents this identical issue and reference is made herein to the *Sandler* petition.

Opinions in *Zeilstra* v. *Hershey*, Civil No. 6251, W. D. Mich., S. D., Nov. 4, 1971, reversed, No. 72-1131 (6th Cir., 1972) have not yet been published and are set forth below.

UNITED STATES OF AMERICA IN THE DISTRICT COURT OF THE UNITED STATES

For the Western District of Michigan
Southern Division

Civil Action No. 6251

EDWARD R. ZEILSTRA,

Plaintiff,

vs.

LEWIS B. HERSHEY, National Director of Selective Service, ARTHUR A. HOLMES, Michigan State Director of Selective Service, ALLEN P. ROUSH, Colorado State Director of Selective Service, Colorado Selective Service Local Board No. 13, Englewood, Colorado (S. CHARLES TOBIAS, ROBERT ALLSHOUSE, R. L. CAMPBELL, JOE R. ATENCIO, GEORGE T. PETERSON), Michigan Selective Service Local Board No. 281, Grand Rapids, Michigan (CHARLES WYNN, EDWARD SOUTHWAY, ALBERT WIERSMA, HARM WESTMAN, CHARLES SAUR),

Defendants.

OPINION AND ORDER

Plaintiff filed the complaint in this action on January 13, 1970, claiming that he was a married Selective Service registrant who was a father and who had received a graduate but not an undergraduate II-S student deferment after June 30, 1967. He further claimed that he was entitled to a fatherhood III-A deferment under the applicable laws and regulations and that the defendants had denied him this deferment. He therefore prayed for a preinduction declaratory judgment, a writ of mandamus ordering that he be classified III-A and other appropriate relief.

On August 2, 1971, plaintiff was granted leave to amend his complaint. He thereupon petitioned this court for a declaration that the induction order under which he currently finds himself is invalid due to the defendants' failure to comply with a valid court order applicable to his case. Plaintiff's Motion for Summary Judgment is presently before the court on the amended complaint.

The defendants originally answered on or about April 15, 1970. Thereafter, by mutual agreement between the parties, the action was suspended pending the results in Gregory v. Tarr, 311 F. Supp. 1 (E. D. Mich. 1970). Gregory was a class action in which precisely the same issues as were here initially involved were at stake. The District Court in that case entered an order on February 27, 1970, declaring that the named plaintiffs in that action and all others similarly situated were entitled to the III-A deferment as a matter of law and ordered that both the named plaintiffs and all the members of the class be reclassified III-A as of the date of the order. Judge Talbot Smith's order directed that "defendants (including the National Director and the State Director of the Selective Service System, defendants

herein) classify plaintiffs . . . (and) all others similarly situated to plaintiffs III-A upon showing that they are members of the class as hereinbefore defined." It further ordered that the National Director of Selective Service and defendant State Director "in exercising their functions under Section 10 of the Act (to) conform to the declaratory judgment made therein." In the case of plaintiff Zeilstra, this was not done, although he clearly showed that he was a proper member of the subject class. Both defendant National Director and defendant State Director had notice of the Gregory order, and both had notice of plaintiff Zeilstra's membership in this class through this action.

On July 7, 1970 the Government moved the Gregory court for a stay pending appeal. On August 17, 1970, that motion was denied. Although entitled to do so under Rule 8 of the Rules of Appellate Procedure, the Government did not move the Court of Appeals for a stay pending appeal. Instead, the defendants simply disregard the District Court's order on their own initiative. Plaintiff Zeilstra was not reclassified III-A during the time that Judge Smith's order was in effect, nor was his induction order canceled, nor was his case reopened, although these steps were necessarily preparatory to reclassifying him III-A pursuant to the court's order. Selective Service Regulations Section 1625.2, 1625.14, and 1625.13.

Ultimately, the Court of Appeals for the Sixth Circuit reversed the District Court. Gregory v. Tarr, 436 F. 2d 513 (1971). On March 26, 1971, this court entered an order setting this case over without date to await the results of the petition for certiorari in Gregory v. Tarr. On June 14, 1971, the United States Supreme Court, Mr. Justice Douglas dissenting, denied the petition for certiorari (No. 1625, Oct. Term 1970).

Defendants presently stand before this court resisting plaintiff's Motion for Summary Judgment and advancing their own Motion for Dismissal on the grounds that this

court, in light of Section 10b(3) of the Military Selective Service Act of 1967 and the Sixth Circuit decision in Gregory, lacks jurisdiction over the subject matter of this action.

It is clear that the Court of Appeals resolution of the Gregory case is dispositive of the merits of plaintiff's original claim of entitlement to a III-A Selective Service classification. Therefore, this court concedes that it is without power to order a III-A classification. However, the action currently before the court assumes a different posture at the present time.

Plaintiff presently alleges that notwithstanding his ineligibility for preinduction review of his III-A classification claim, his current induction order may be declared legally invalid due to its roots in nondiscretionary lawless action by the defendants.

It is the considered judgment of this court that plaintiff does state proper grounds for review and that the induction order now pending in plaintiff's case is invalid.

While the Declaratory Judgment Act, 28 U. S. C. Sections 2201-03, and the Mandamus and Venue Act of 1962, 28 U. S. C. Section 1361, confer upon the court jurisdiction over the kind of matters raised by plaintiff's petition, ordinarily a federal court may not review the validity of an induction order issued by the Selective Service prior to the time of actual induction into the Armed Forces. The Military Selective Service Act of 1967, Section 10(b)(3), provides, in relevant part, that:

> "No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution . . . after the registrant has responded either affirmatively or negatively to an order to report for induction . . ."

Despite this general rule, however, the United States Supreme Court has ruled that preinduction review is ap-

propriate where the action of Selective Service officials is "basically lawless." (See 393 U. S. at page 237.) Oestereich v. Selective Service Local Board No. 11, 393 U. S. 233 (1968), and Breen v. Selective Service Local Board No. 16, 396 U. S. 460 (1970).

Oestereich involved a divinity student whose exemption from service was mandated by Section 6(g) of the Selective Service Act; Breen an undergraduate student whose deferment was mandated by Section 6(h)(i). In both cases, plaintiffs had been reclassified as delinquent pursuant to regulations which the court found to be unauthorized by the Act.

The Supreme Court characterized the actions of the respective local boards as "basically lawless" and held that preinduction review would lie where "a draft registrant who was required by the relevant law not to be inducted was in fact ordered to report for military service." 396 U. S. at 467. Conversely, in Clark v. Gabriel, 393 U. S. 256 (1968), in a short per curiam opinion entered without argument, the court included that preinduction review would not lie vis a vis a local board's denial of a conscientious objector exemption, an act which "inescapably involves a determination of fact and an exercise of judgment." 393 U. S. at 258. The distinction sought to be drawn in these cases was clearly one between mandatory and discretionary acts, as Justice Harlan noted in his concurring opinion in Breen. 396 U. S. at 468.

The true essence of Breen and Oestereich is that preinduction review can and should be entertained, notwithstanding Section 10(b)(3), whenever the Selective Service System has been shown to have violated a mandatory legal duty. Many Circuits Courts of Appeal have recognized this principle. The largest number of cases involves the I-S deferment under Section 6(i) of the Act. Bowen v. Hershey, 410 F.2d 962 (1st Cir. 1969); Carey v. Local

Board No. 2, 412 F.2d 71 (2nd Cir. 1969); Foley v. Hershey, 409 F.2d 827 (7th Cir. 1969); and Nestor v. Hershey, 425 F.2d 504 (D.C. Cir. 1969).

That the mandatory duty which gives rise to preinduction review must have statutory derivation cannot be soundly argued, however. The spirit, thrust and rationale of Breen and Oestereich point to the *nature* of the violated duty, not its source.

The order of a Federal District Court imposes a definite mandatory duty upon the persons addressed by that order at least as imperative as does a legislative act. Indeed, in the area of constitutionally protected free speech, the Supreme Court of the United States has ruled that court-imposed prior restraints must be obeyed as a pre-requisite to standing for subsequent challenge, whereas statutory prior restraints may be disregarded and subsequently attacked in court. See Walker v. City of Birmingham, 388 U.S. 307 (1967).

In Shea v. Mitchell, 421 F.2d 1162 (D.C. Cir. 1970), the court held that judicial review would lie because the "relevant law" focused upon in Breen as the source of the mandatory duty did not necessarily have to come from a statute.

> "Whether that 'law' involves statutes, court decisions, or regulations is as irrelevant as whether it involves an 'exemption' or a 'deferment.'" 421 F.2d at 1165-66.

In the present case, the plaintiff does not argue that the defendants misconstrued the statute in violation of an earlier court decision; he shows that defendants violated a specific court order directed at them, of which they knew and which they unsuccessfully sought to stay. No clearer mandatory duty and wilful breach thereof could be established.

Gregory v. Tarr, supra, was a valid class action brought pursuant to both subparagraphs (1) and (2) of Rule 23(b) of the Federal Rules of Civil Procedure. Judge Smith's order declared it to be so, and the Government chose not to appeal from that aspect of the case. Although that order was later reversed on the classification issue, as a member of the validly defined class, plaintiff Zeilstra was entitled to enforce the District Court's unstayed order during the period before the Sixth Circuit Court of Appeals decision. The government chose to ignore that order. It is well within the province of this court's power to review the implications for plaintiff's case of such a blatant and cavalier disobedience of a District Court's order in the defendants' classification and processing activities.

Even assuming that the Sixth Circuit decision in Gregory held that the District Court lacked jurisdiction, under Section 10(b)(3), to issue its order, the defendants' duty to obey that order before its reversal was not retroactively extinguished. In United States v. Shipp, 203 U.S. 563 (1906), the Supreme Court, per Holmes, J., ordered trial on an information charging a contempt of an order of that court despite the defendants' argument that the Federal Courts had no jurisdiction in the matter for want of a federal question.

> "Even if the Circuit Court had no jurisdiction and if this court had no jurisdiction of the appeal, this court and this court alone could decide that such was the law." 203 U.S. at 573.

The Shipp case was resoundingly affirmed in United States v. United Mine Workers, 330 U.S. 258 (1947). In that case, John L. Lewis had violated an injunction of a Federal District Court on the ground that the Norris-LaGuardia Act deprived the court of jurisdiction to issue the injunction (just as in the Gregory case the question

was whether Section 10(b)(3) barred judicial intervention). In affirming Lewis' contempt conviction, the Supreme Court held:

> "We insist upon the same duty of obedience where, as here, the subject matter of the suit, as well the parties, was properly before the court; where the elements of Federal jurisdiction were clearly shown; and where the authority of the court of first instance to issue an order ancillary to the main suit depended upon a statute, the scope and applicability of which were subject to substantial doubt. The District Court on November 29 affirmatively decided that the Norris-LaGuardia Act was of no force in this case and that injunctive relief was thereof authorized. Orders outstanding or issued after that date were to be obeyed until they expired or were set aside by appropriate proceedings, appellate or otherwise." 330 U.S. at 294.

Significantly, the five-Justice majority which sustained the convictions in the Mine Workers case contained two Justices (Frankfurter and Jackson), who would have held that the Norris-LaGuardia Act did, in fact, prohibit the courts from issuing the injunctions in question.

These cases recognize that the line between jurisdictional and non-jurisdictional defects is a difficult one to draw. The courts, not the parties, have the expertise to decide these questions. If a court has issued an order not "transparently invalid or (having) only a frivolous pretense to validity" (Walker, supra, at 315), then the parties should obey the order and not substitute disobedience for appeal. . . . "

Judge Smith's order in Gregory was not transparently invalid. The District Court considered very complicated arguments and arrived at a reasonable conclusion. The fact that the Court of Appeals subsequently disagreed did not render the District Court opinion frivolous.

Consequently, in light of the mandatory duties imposed by a valid Federal District Court's order upon defendants relevant to processing plaintiff Zeilstra's case, and in light of the apparent connection between the breach of those duties by defendants and the vitality of the induction order presently facing the plaintiff, this court finds that it has jurisdiction to review defendants' classification and processing activities (during the pendency of the valid and binding district court order) and to consider the validity of that induction order, even though plaintiff has not yet been inducted. Accordingly, defendants' Motion to Dismiss is hereby denied.

Turning, then, to plaintiff's induction order, it is plain that had defendants properly proceeded to comply in good faith with the District Court order in Gregory, the present induction order could not have survived. That order, still pending, is dated November 19, 1969, well before the District Court order in Gregory. The first step of compliance with the mandatory court order would necessarily have been to quash the induction order. Defendants' failure to so act renders that induction order defective and void.

It is a fundamental maxim of equity that equity regards as done that which ought to have been done. See 2 Pomeroy, Equity Jurisprudence, Sections 364-377 (5th ed. 1941). Recently, the Sixth Circuit Court of Appeals applied this equitable maxim in a case which, like the one at bar, involved disobedience to a court order. Candler v. Donaldson, 272 F.2d 374 (1959). The deceased holder of a life insurance policy was found to have changed the beneficiaries in violation of a court order in a divorce proceeding. The Sixth Circuit held, citing the equitable principle above-mentioned, that the divorced wife of the decedent was entitled to the proceeds of the policy as if the bene-

ficiary had not been changed. See, also, Peckham v. Metropolitan Life Insurance Co., 415 F.2d 312 (10th Cir. 1969).

The courts have not been reluctant to extend this maxim into the area of administrative law. The Ninth Circuit has held that where the Federal Power Commission failed to process two pending cases together with the result that the plaintiff company was wrongfully deprived of a more advantageous power license, the court, applying the maxim, would award the company the more advantageous license. Montana Power Co. v. FPC, 330 F.2d 781 (9th Cir. 1964). Similarly, the maxim has been applied to uphold the ruling of an agency that a company will be deemed to have complied with a statute even though it has not. Central Maine Power Co. v. FPC, 345 F.2d 875 (1st Cir. 1965).

Defendants should have quashed the November 19, 1969 induction order for plaintiff Zeilstra. They refused to do this, despite their knowledge of a court order, valid and unstayed, good on its face, which directed them to do this. The court finds such refusal unlawful and declares that the surviving unquashed induction order of November 19, 1969, directed to plaintiff Zeilstra, is void and of no force and effect — this being the circumstance that would have resulted had defendants processed plaintiff's file as they were directed.

In so ruling, this court is not simply enforcing a court order which is no longer vital, nor conferring special equitable benefits upon the plaintiff for their own sake. This court makes no reference whatever to the appropriateness of a III-A classification in plaintiff's case at this time.

This court does hereby declare that the consequences of blatant acts of disobedience to a pending valid court order will not be recognized as lawful. Since the November 19, 1969 induction order in this case was such a consequence, it cannot be accorded legitimacy. Review of that

order is, in the context of this case, appropriate, for the reasons detailed above. This court, having carefully examined the specific peculiar factual and legal issues raised by this case, declares that the November 19, 1969 induction order upon Edward R. Zeilstra is null and void and of no effect.

Plaintiff's Motion for Summary Judgment, insofar as it rests on plaintiff's challenge to the validity of his induction order, is granted.

It Is Therefore Ordered that defendants National Director of the Selective Service System, State Director of the Selective Service System, and the Local Draft Board quash the Induction Order upon Edward R. Zeilstra, dated November 19, 1969, and cease and desist from any attempt to enforce it.

Dated: November 4th, 1971.

Noel P. Fox,
Chief District Judge.

IN THE UNITED STATES COURT OF APPEALS
For the Sixth Circuit

EDWARD R. ZEILSTRA,
Plaintiff-Appellee

vs.

CURTIS W. TARR, National Director of Selective Service System, Et Al,
Defendants-Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

No. 72-1131
Decided and Filed August 24, 1972

Before WEICK, EDWARDS and MILLER, *Circuit Judges.*

WEICK, Circuit Judge. Appellee Zeilstra contended in the District Court that he was a member of the class in the class action brought by Stephen L. Gregory and others in the United States District Court for the Eastern District of Michigan, against the National Director of Selective Service, and others, for a mandatory injunction to compel their reclassification and the reclassification of members of their class throughout the nation, into III-A (fatherhood deferment), and to enjoin their induction into the armed forces.

In *Gregory* the named plaintiffs had been granted II-S (student) deferments under the Military Selective Service Act of 1967[1] while attending graduate schools. It was their claim that they were entitled as a matter of right to a III-A fatherhood classification notwithstanding the prohibition in

1. 50 U. S. C. App. 451 et seq. (1964 ed., Supp. 5).

32 C. F. R. § 1622.30(a), which denied fatherhood deferments to persons who had been "classified II-S under the 1967 Act." They claimed the regulation was invalid if not given the interpretation which they placed upon it.

The District Court in *Gregory* sustained the plaintiffs and issued a very broad mandatory order requiring the National Director of Selective Service and the other defendants to classify the plaintiffs and the members of their class throughout the nation in III-A, and enjoining their induction in the armed forces. *Gregory* v. *Hershey*, 311 F. Supp. 1 (Mich. 1969).

However, no notice was given of the pendency and prayer of the *Gregory* class action, to any of the members of the class, as the District Court found it impractical to do so.

Zeilstra's action was pending in the United States District Court for the Western District during the pendency of *Gregory* in the Eastern District of Michigan. Zeilstra in his action sought to enjoin the Selective Service System from inducting him into the armed forces, urging the same contentions as those in *Gregory*, namely, that he was entitled as a matter of right to a fatherhood classification III-A, even though he had been deferred under a II-S student classification while attending graduate school. The District Court deferred action in Zeilstra's case to await the outcome of *Gregory*.

In *Gregory* the District Court denied a stay pending appeal. The Selective Service System appealed to this Court and filed a motion for an expedited appeal, which motion was granted. Pending appeal to this Court the Selective Service System made no attempt to induct any of the plaintiffs, including Zeilstra. Likewise, no attempt was made by the plaintiffs in *Gregory* to enforce the order of the District Court pending the appeal.

Upon consideration of *Gregory* we reversed the judgment of the District Court and held that the District Court was

without jurisdiction to entertain said action because of the provisions of Section 10(b)(3) of the Military Service Acts of 1967 and 1971, 50 U. S. C. App. 460 (b)(3). *Gregory* v. *Tarr, sub nom,* 436 F. 2d 513 (6th Cir. 1971), *cert. denied,* 403 U. S. 922 (1971). *Schrader* v. *Selective Service System,* ____ F. 2d ____ (7th Cir. No. 71-1767, decided July 28, 1972).

It was also our view that fatherhood deferments, III-A, are discretionary with the Local Boards, rather than mandatory, and that the regulation prohibiting III-A classification to registrants who had received student II-S deferments, was valid. *Cf. Fein* v. *Selective Service System,* 405 U. S. 365 (1972).

Following our decision in *Gregory,* Zeilstra amended his complaint in the District Court and alleged therein that the Selective Service System disobeyed the order of the District Court in *Gregory* by not reclassifying the plaintiffs in that case and all the members of their class throughout the nation, from classification I-A into III-A, fatherhood deferment. Zeilstra further contended that the action of the Selective Service System in failing and refusing to reclassify the members of said class into III-A was lawless, and that the Court should treat the case as if the Selective Service System had obeyed the order of the Court and reclassified all of the members of the class into III-A. The District Court agreed and entered an injunction against the Selective Service officials restraining Zeilstra's induction. We reverse.

As we see it, the District Court was bound by our decision in *Gregory,* but simply did not follow it. Like the District Court in *Gregory,* the District Court in the present case was without jurisdiction to entertain the pre-induction injunction action against the Selective Service System, 50 U. S. C. App. 460(b)(3).

The District Court in the present case treated the man-

datory order in *Gregory* as a valid order. It erred in doing so. It was not a valid order becasue the Court was without jurisdiction to enter it, and the order was a nullity. *In Re Sawyer,* 124 U. S. 200 (1888); 46 Am. Jur. 2d 347.

The Selective Service System had the right to question the validity of the order, which it did in appealing therefrom to this Court, and we set the order aside; it had no validity initially and certainly not after we had reversed and set it aside.

The Fifth Circuit followed *Gregory* in *Pasquier* v. *Tarr*, 444 F. 2d 116 (5th Cir. 1971), stating:

> "One of the appellant's principal claims on this appeal asserted that he was entitled to the *res judicata* effects of a judgment in the earlier class action of Gregory v. Hershey, E. D. Mich., 1969, 311 F. Supp. 1. There the District Court found invalid the withholding of the fatherhood deferment to those registrants, otherwise qualified, whose induction had previously been deferred for graduate—as opposed to undergraduate—study. However, that judgment collapsed, both for the parties and the members of the class, following its reversal by the United States Court of Appeals for the Sixth Circuit in Gregory v. Tarr, 6 Cir., 1971, 436 F. 2d 513.
>
> "We follow *Gregory* and hold that preinduction relief was properly denied." (444 F. 2d at 117).

Both *Gregory* and *Pasquier* were followed by the Fourth Circuit in *Sandler* v. *Tarr,* ____ F. 2d ____ (4th Cir., No. 71-2158, decided May 25, 1972).

In *Gregory* we indicated doubt about the validity of the alleged class action because no notice to the members of the class had ever been given, *id.*, fn. 2.

In *Eisen* v. *Carlisle and Jacqueline,* 391 F. 2d 555 (2d Cir. 1968), it was held that notice is required as a matter of due process in all representative actions.

We hold that *Gregory* was not a valid class action since no notice was ever given to the members of the class. *Schrader* v. *Selective Service System*, ____ F. 2d ____ (7th Cir. No. 71-1767, decided July 28, 1972).

The judgment of the District Court is reversed and the cause is remanded to that Court with instructions to dismiss the complaint.

JUDGE EDWARDS concurred in the result.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-680

THOMAS T. SCHRADER, PETITIONER

v.

SELECTIVE SERVICE SYSTEM LOCAL BOARD NO. 76 OF WISCONSIN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner commenced this pre-induction civil suit in the United States District Court for the Eastern District of Wisconsin on November 25, 1970, seeking to enjoin his outstanding induction order of November 23, 1970, and to obtain reclassification to Class III-A (fatherhood deferment). The district court, relying on an earlier class-action decision by the Michigan district court in *Gregory* v. *Hershey*, 311 F. Supp. 1 (E.D. Mich.), then pending on appeal to the Sixth

Circuit, temporarily restrained petitioner's induction (Pet. App. A7-A15).[1]

Thereafter the Sixth Circuit reversed the Michigan district court's judgment (*Gregory* v. *Tarr*, 436 F.2d 513, certiorari denied, 403 U.S. 922), and the government moved in this case for dissolution of the restraining order. The Wisconsin district court denied the motion, ruling that, since petitioner was a member of the class covered by the Michigan district court's decree, *i.e.*, a registrant seeking fatherhood status after holding a graduate student (II-S) deferment under the 1967 Act, he was protected from the November 1970 induction order by the unstayed mandate of the district court in *Gregory*. A divided court of appeals reversed (Pet. App. A20-A29).

Petitioner contends here, as he did below, that issuance of his induction order despite the mandate of the district court in *Gregory* constitutes unlawful action that warrants preinduction judicial review under Section 10(b)(3), 50 U.S.C. App. 460(b)(3). He makes essentially the same arguments that were presented in the petition for certiorari in *Sandler* v. *National Director of Selective Service*, No. 72-309, which was denied on November 6, 1972.

As we pointed out in our brief in opposition in

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[1] The Michigan court had ruled that fathers who had received II-S deferments under the 1967 Act while graduate students, rather than undergraduates, could not be denied fatherhood deferments simply because they held the earlier classification, even though 32 C.F.R. (1970 ed.) 1622.30(a) so specified. The induction of registrants in this category was enjoined by the Michigan district court.

Sandler,[2] the board's denial of petitioner's request for a fatherhood deferment, because he had earlier held a graduate student (II-S) deferment under the 1967 Act, was in accord with the existing Selective Service regulation, 32 C.F.R. (1970 ed.) 1622.30(a), and was not "administrative action, based on reasons unrelated to the merits of the claim * * * depriv[ing] the registrant of the classification to which, otherwise and concededly, he is entitled by statute" (*Fein* v. *Selective Service System*, 405 U.S. 365, 374-375). This, then, is not the type of case permitting judicial review prior to induction.

While petitioner places heavy emphasis on the fact that his induction order issued at a time when the district court's judgment in *Gregory* was outstanding, that is not an adequate basis for granting him the relief he now seeks. As we pointed out in response to the same argument in *Sandler*, petitioner's induction order had been stayed pending review of the Michigan decree by the court of appeals; when the Sixth Circuit reversed in *Gregory*, petitioner, like the plaintiffs in *Gregory* and all other members of the alleged class, was subject to immediate induction. It is undisputed that petitioner is not now entitled to a fatherhood deferment on the basis of any *res judicata* effect of the *Gregory* district court decision. Similarly, he cannot rely upon that decision to justify a pre-induction challenge to the denial of his fatherhood deferment while refusing to recognize that, as a result

[2] A copy of our *Sandler* brief in opposition is being furnished to petitioner's counsel.

of the court of appeals' reversal, that judgment "collapsed" and was of no further effect (*Pasquier v. Torr*, 444 F.2d 116, 117 (C.A. 5)).

The court of appeals' ruling that in these circumstances Section 10(b)(3) bars preinduction review of the denial of petitioner's fatherhood deferment is in accord with the consistent line of decisions rejecting similar attempts by registrants who are not parties to the *Gregory* suit to rely upon the reversed district court decision in that case to avoid induction.[3] There is no cause for further review of that ruling.[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

NOVEMBER 1972.

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[3] See cases cited at p. 9 of our brief in opposition in *Sandler*.

[4] We point out that the issue raised in the petition has limited importance. It involves only a narrow category of registrants—those who (a) were denied fatherhood deferments because they had received a graduate student deferment after June 30, 1967 and (b) were issued an induction order while the *Gregory* decision was pending on appeal. The number of registrants so situated necessarily is extremely small, and, in light of the court of appeals' ruling in *Gregory*, none of them is entitled to the deferred fatherhood status they claim as a basis for avoiding induction. Moreover, the issue is of no significance to new registrants, since the fatherhood deferment was terminated in 1970. See Executive Order No. 11527, April 23, 1970, 35 F.R. 6571, revoking 32 C.F.R. (1970 ed.) 1622.30(a).

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